91-1697

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANCIS EDWIN BASS, *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA, *et al.*

Petition for a Writ of Certiorari to the Supreme Court of South Carolina

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803 (1989), may under any circumstance be "applied" nonretroactively so as to defeat federal retirees' entitlement to refunds of unconstitutional state taxes imposed upon their federal annuities.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	4
CONCLUSION	13
APPENDIX A	1a
APPENDIX B	12a
APPENDIX C	13a
APPENDIX D	24a
APPENDIX E	33a
APPENDIX F	41a

TABLE OF AUTHORITIES

Cases: Page

Allied-Signal Corp. v. Director, Division of Taxation, U.S. No. 91-615 7
American Trucking Ass'ns v. Smith, 496 U.S. 167 (1990) 3
Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984) 6
Barker v. Kansas, No. 91-611, *rev'd* (Apr. 21, 1992) 4
Bobo Brothers v. South Carolina Tax Comm'n, 244 S.E.2d 519 (S.C. 1978) 12
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) ..... *passim*
Colonial Stores v. South Carolina Tax Comm'n, 168 S.E.2d 774 (S.C. 1979) 11
Colorado v. Kuhn, No. 91-980 4
Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989) ..... *passim*
Enterprise Irrigation District v. Canal Co., 243 U.S. 157 (1917) 11
Etiwan Fertilizer Co. v. South Carolina Tax Comm'n, 60 S.E.2d 682 (S.C. 1950) 10
Guaranty Bank & Trust Co. v. South Carolina Tax Comm'n, 173 S.E.2d 367 (S.C. 1970) 11
Harper v. Virginia Department of Taxation, 111 S.Ct. 2883 (1991) 5
Harper v. Virginia Department of Taxation, 410 S.E.2d 629 (Va. 1991) 6
Harrison v. South Carolina Tax Comm'n, 199 S.E.2d 763 (S.C. 1973) 12
James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2338 (1991) ..... *passim*
Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilberson, 111 S.Ct. 2773 (1991) 7
Lawrence v. Tax Comm'n of Mississippi, 286 U.S. 276 11
McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) 3, 8, 11
Newberry Mills, Inc. v. Dawkins, 190 S.E.2d 503 (S.C. 1972) 12
Pledger v. *Bosnick*, No. 91-375 (Arkansas) 4

TABLE OF AUTHORITIES—Continued

	Page
Shasta Beverages v. South Carolina Tax Comm'n, 310 S.E.2d 655 (1983)	12
Sheehy v. Montana, 820 P.2d 1257 (Mont. 1991)	6
Slater Corp. v. South Carolina Tax Comm'n, 314 S.E.2d 31 (S.C. 1984)	11
Swanson v. North Carolina, 407 S.E.2d 791 *on reh'g* 410 S.E.2d 490 (N.C. 1991)	6
United States v. Johnson, 457 U.S. 537 (1982)	8
Statutes and Regulations:	
4 U.S.C. § 111	8
28 U.S.C. § 1257(a)	2
S.C. Stat. Ann. § 12-47-445	11
S.C. Stat. Ann. § 12-47-440	10

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PETITION FOR A WRIT OF CERTIORARI

Francis Edwin Bass, Jr., Marvin L. Jones, James R. Marvin, Wilton A. Hockenberry, Catherine Louise Moyers, John Gilreath, Mildred B. Jenkins and J. Loring Jenkins, on their own behalf and behalf of all others similarly situated,[1] hereby petition this Court for a writ of certiorari to the Supreme Court of South Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina (App. A at 1a-11a) is reported at 414 S.E.2d 110. This Court's Order remanding this matter to the Supreme Court of South Carolina (No. 90-673, June 20, 1991, App. B at 12a) is reported at 111 S. Ct. 2881. The

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[1] The class certified by the trial court includes approximately 70,000 similarly situated federal annuitants who have opted to join this suit. Transcript of Record ("Tr.") 58-72.

prior decision of the Supreme Court of South Carolina (on request for rehearing), App. C at 13a-22a, is reported at 395 S.E.2d 171. The original decision of that court, App. D at 24a-32a, and the decision of the trial court, App. E at 33a-40a, are unpublished.

JURISDICTION

The decision of the Supreme Court of South Carolina after remand from this Court was entered on January 27, 1992. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATEMENT

Prior to this Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), South Carolina taxed the pensions of federal retirees but exempted from taxation the pensions of its own retirees. The South Carolina Legislature responded to *Davis* in two ways. As required, it repealed the discriminatory tax. But the legislature went a step further: it enacted a new section of the tax code providing that taxes found to be unconstitutional or unlawful were not erroneous within the meaning of South Carolina's three year tax refund provision. S.C. Stat. Ann. § 12-47-445.

Petitioners filed suit seeking a refund of the taxes imposed on their federal retirement payments under South Carolina's general tax refund statute, S.C. Stat. Ann. § 12-47-440. This case was brought as a class action on behalf of all federal retirees in South Carolina who had paid taxes on their federal pensions during the years 1985 through 1988. In refusing to pay refunds, the state's principal defense was the newly-enacted § 12-47-445: because the retirees were claiming a refund for unconstitutional or otherwise unlawful taxes, they could not avail themselves of the three year refund provisions of § 12-47-440. The trial court rejected this defense, as well as the

state's nonretroactivity defense, and held that refunds were due. App. E at 39a.

On appeal, the Supreme Court of South Carolina reversed. The court characterized the two primary issues before it as the retroactivity of *Davis* and the effect of § 12-47-445. App. D. at 25a. In its initial decision in this case, the court applied a *Chevron*[2] analysis to conclude that *Davis* should be applied prospectively only. App. D at 31a. The court did not reach the issue of the effect of § 12-47-445 and it noted, without comment, that petitioners had filed under § 12-47-440. App. D at 28a n.1.

Only weeks after this decision, this Court issued its opinions in *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990), and *McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). Arguing that these decisions cast substantial doubt on the court's *Chevron* analysis, petitioners requested rehearing. While the court reaffirmed its initial decision in all respects, it also added a second reason for denying relief: although neither briefed nor argued, and despite its tacit acceptance in its initial decision (App. D at 28a n.1), the court held that income tax refunds were not available under § 12-47-440.

Petitioners sought review in this Court (No. 90-673). To the state's asserted independent state law ground, petitioners argued that reliance on § 12-47-440 was not adequate to dispose of their claims: petitioners were entitled to a "clear and certain" remedy for unconstitutional taxation and if South Carolina statutes did not provide one, the Due Process clause would. *See* Petition for Certiorari, *Bass v. South Carolina*, U.S. No. 90-673 (Oct. 24, 1990) at 18-19; Reply Brief in Support of Petition for a Writ of Certiorari (Nov. 30, 1990), at 2-3. On June 28, 1991, this Court granted the petition

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[2] *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

for a writ of certiorari, vacated the decision and remanded for consideration of *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2338 (1991).

On remand, the Supreme Court of South Carolina reaffirmed its decision. First, the court held that § 12-47-440 did not allow for the refund of income taxes. As to the applicability of *Beam*, the court held that because this Court did not address the issue of retroactivity in *Davis*, that issue remained open under *Beam*. Thus, the court applied *Chevron* to conclude that *Davis* should be applied prospectively only.

REASONS FOR GRANTING THE PETITION

This case raises questions of substantial public importance concerning the propriety of states retaining taxes collected in violation of the Constitution and statutes of the United States. Specifically, this case presents the question of whether states may refuse to refund taxes collected in violation of the Supremacy Clause and 4 U.S.C. § 111 upon a prospective-only application of *Davis v. Michigan*. This is the same question this Court addressed in its remand order in this case last Term; because the court below misperceived the import of *Beam* in its disposition of this case, this identical question is now posed again. Review by this Court is necessary to resolve finally the issue of the retroactivity of *Davis* and thus end the counterproductive and costly litigation of this issue throughout the various states.

1. This petition is the seventh to be filed this Term challenging the merits of a state's refusal to refund taxes collected from federal retirees in violation of the intergovernmental tax immunity doctrine of the Supremacy Clause and 4 U.S.C. § 111.[3] In *Davis*, this Court

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[3] *See Pledger v. Bosnick*, No. 91-375 (Arkansas); *Barker v. Kansas*, No. 91-611, *reversed* (Apr. 21, 1992); *Harper v. Virginia Department of Taxation*, No. 91-794; *Colorado v. Kuhn*, No. 91-980;

invalidated Michigan's discriminatory taxation of federal pensions. Since that time, litigation has wended its way through the courts in the twenty-two states that imposed *Davis*-type taxes. This case, like *Harper v. Virginia Department of Taxation*, 111 S. Ct. 2883 (1991), appears on this Court's docket a second time: after remand to consider the impact of *Beam*, the court below held that "nothing articulated in *Beam* requires a different result from that reached in our prior decision." App. A at 11a, and thus, it affirmed its denial of refunds to petitioners. That is, the court below concluded that *Beam* did not mandate that *Davis* be applied retroactively and that under its application of the analysis of *Chevron Oil*, *Davis* was not entitled to retroactive application.

Accordingly, this petition presents the identical question presented and considered in this case last Term: whether petitioners are entitled to refunds irrespective of the application of *Chevron* and, if not, whether application of *Chevron* would yield retroactive application of *Davis*. This same question will ultimately be dispositive in the nineteen states in which litigation over *Davis* refunds is still ongoing. Until definitive guidance is provided by this Court, state courts will continue to grapple with the issue of refunds of *Davis*-type taxes. Review by this Court is thus necessary to resolve this question of demonstrated difficulty and importance.

2. The lower court's reading of *Beam* to allow for application of a *Chevron* analysis here is fundamentally flawed. Following the lead of the Supreme Court of North Carolina, the court below focused on Michigan's concession in *Davis* that refunds were the appropriate remedy if the Court were to invalidate its tax. *See* 489 U.S. at 817. The court below held that because the issue

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Swanson v. North Carolina, No. 91-1436; and *Sheehy v. Montana Department of Revenue*, No. 91-1473.

of entitlement to refunds was conceded and not decided by this Court, the "doctrine of *stare decisis* does not apply." App. A at 9a, *citing Swanson v. North Carolina*, 407 S.E.2d 791, 795, *on reh'g* 410 S.E.2d 490 (N.C. 1991); *Sheehy v. Montana*, 820 P.2d 1257, 1259 (Mont. 1991); *Harper v. Virginia Department of Taxation*, 410 S.E.2d 629, 631 (Va. 1991). Accordingly, the court below reasoned that, unlike the situation in *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), *Davis* did not apply its ruling to the parties before it. The court below thus determined that it was free to engage in a *Chevron* analysis to determine whether *Davis* should be applied retroactively and it affirmed its pre-*Beam* decision in its entirety. App. A at 10a.

The court's focus on Michigan's concession that refunds were the appropriate remedy for the invalidation of its tax is misplaced. As *Beam* emphasizes, the substantive question of the constitutionality of a tax and the remedial question arising upon its invalidation are two distinct questions. 111 S.Ct. at 2443. In *Davis*, the Court held that Michigan's tax violated the Supremacy Clause and 4 U.S.C. § 111. 489 U.S. at 817. Self-evidently, had the Court not invalidated the tax, Michigan's concession would have been of no moment. So too would it have been inconsequential had the Court invalidated Michigan's tax, but not applied its decision to the parties before it. Michigan's concession only became operative upon the Court's invalidation of the tax *and* its determination to apply that decision to the parties before it.

To be sure, the issue of retroactivity was neither litigated nor even mentioned in *Davis*. This being so, however, *Davis* applies retroactively, for the overwhelming presumption is retroactivity. *See Beam*, 111 S. Ct. at 2445 n.2 (whether "the prospectivity issue can . . . be said to have been litigated and by implication actually to have been decided by the Court" is "unnecessary to our ruling here"); *id.* at 2448 (White, J., concurring)

("even if . . . the Court was quite wrong in [applying its ruling to the parties before it], that is water over the dam, irretrievably.") *See also id.* at 2451 (O'Connor, J., dissenting) ("Given that the usual course in cases before this Court is to apply the rule announced to the parties in the case, the most reasonable reading of [*Bacchus*' silence on retroactivity] is that the Court followed its customary practice." *See also Lampf, Pelva, Lipkind, Prupis & Petigrow v. Gilberson*, 111 S. Ct. 2773, 2787-88 (1991) (O'Connor, J., dissenting) (objecting to retroactive application of the rule announced and noting that the majority opinion did not even mention the issue of retroactivity).

Indisputably, the Court in *Davis* "did not reserve the question of whether its holding should be applied to the parties before it." 111 S. Ct. at 2445. Accordingly, *Davis* must "properly be understood to have followed the normal rule of retroactive application in civil cases." *Id.* Thus, the court below erred in holding that the concession of refunds in *Davis* allowed it an escape from *Beam*'s command of retroactivity.

3. This Court in *Beam* did not "speculate as to the bounds or propriety of pure prospectivity." 111 S. Ct. at 2448. If the court below is correct in its holding that *Davis* did not apply its holding to the parties before it and therefore its retroactivity is not determined under *Beam*, then this petition presents the question left open in *Beam* and presented before this Court on reargument in *Allied-Signal Corp. v. Director, Division of Taxation*, U.S. No. 91-615: is "pure prospectivity" a viable jurisprudential doctrine? Separately, if pure prospectivity is viable, this case presents the question can *Davis* appropriately be applied prospectively only?

Petitioners submit that prospective decision-making is not a proper judicial function. Petitioners adopt the position taken by Justice Stevens in his dissent in *American Trucking Assn's v. Smith*, 110 S. Ct. at 2350—that

courts enjoy latitude in fashioning equitable remedies, but that in deciding substantive questions of law, they are bound "to determine the rights of litigants in accordance with [their] best current understanding of the law." Thus, petitioners would argue that *Chevron* analysis would at most be relevant to determining, within constitutionally permissible bounds, an appropriate remedy.

Even if *Chevron* were an appropriate choice of law vehicle, however, *Davis* would nonetheless be entitled to retroactive application. The threshold *Chevron* factor is the establishment of a new principle of law. *Chevron*, 404 U.S. at 106; *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982); *McKesson*, 110 S. Ct. at 2247 n.15. *Davis* could not satisfy this threshold test. In *Davis*, this Court applied the Public Salary Tax Act of 1939 (4 U.S.C. § 111) to the discriminatory taxation at issue, and found the state's disfavored treatment of federal retirees to be unlawful. 489 U.S. at 817. Any new principle of law implicated in *Davis* (if indeed there was one) was announced not by this Court in 1989 but by Congress in 1939. The holding in *Davis* is dispositive on this point:

> We have no difficulty concluding that civil service retirement benefits are deferred compensation for past years of service rendered to the government.
>
> * * * *
>
> [T]he overall meaning of § 111 is unmistakable: it waives whatever immunity past and present federal employees would otherwise enjoy from state taxation of . . . retirement benefits . . ., except to the extent that such taxation discriminates on account of the source of compensation.
>
> * * * *
>
> Any other interpretation of the nondiscrimination clause [of 4 U.S.C. § 111] would be implausible at best.

Davis, 489 U.S. at 808-10, citations omitted. In light of the ease with which this Court reached its conclusions in

Davis, and in light of that decision's precedential underpinnings, the contention that *Davis* could satisfy the threshold *Chevron* test is "implausible at best."

Moreover, the equities overwhelmingly favor retroactive application of *Davis*. The sole "equitable" argument for nonretroactive application of *Davis* is that refunds will prove costly to the states. Thus, the court below has held that because the state is short on cash, the law enacted by Congress in 1939 is inoperative and the taxes collected in violation of that law are not, in fact, unlawful. This is analytically as satisfying as a taxpayer asserting that because he has no money to pay the assessed tax, he owes no taxes. Indeed, it is even more perverse, for it suggests that the greater the magnitude of the constitutional violation, the greater the state's equitable claim not to rectify it.

Nor does this analysis explain why the state's fiscal condition at the time the refund claims are litigated should provide a basis for denying relief altogether. It would seem that if indeed the state is truly unable to pay for its unconstitutional actions, then it should be required to pay what it can and to pay the remainder when it can. But not only is it counterintuitive to excuse the state altogether from liability because of its depleted coffers, moreover it draws the courts well beyond their constitutional powers: it certainly is not a proper judicial function for courts to determine how much of a refund a state can afford and accordingly at what point a refund becomes so expensive that the underlying conduct must be deemed lawful.

In denying refunds under *Chevron* the court below incorporates this illogic. Petitioners submit that *Chevron* is inapposite to their claims. If *Chevron* is apt, then review by this Court is additionally necessary to address the unprincipled application of that analysis by the court below.

4. The court below suggests that its decision rests on an "adequate independent state law ground." App. A at 3a. This state law ground is the same as that advanced in its earlier opinion vacated by this Court: petitioners' failure to utilize the proper refund procedures precludes them from obtaining any relief.

The court below has now issued three opinions in this case. In the first opinion, the court denied refunds solely upon a nonretroactive application of *Davis*, making no mention of potential state law impediments to relief. *See* App. D. Petitioners sought rehearing, arguing that this Court's intervening decisions in *McKesson* and *American Trucking Ass'ns* cast substantial doubt on the viability of *Chevron* analysis as a tool to deny relief from unconstitutional taxation. In response, the court below issued an amended opinion that, while reaffirming its *Chevron* analysis and disclaiming reliance on state law grounds, nonetheless held that petitioner's erroneous utilization of § 12-47-440 precluded relief. After remand from this Court to consider the impact of *Beam*, the court below issued a third opinion, this time "based primarily on the adequate and independent state law ground that the retirees are procedurally barred from recovery because they failed to proceed under the applicable state statute." App. A at 10a.

The evolution of this "adequate and independent state law ground," and lengths to which the court below had to go to reach it,[4] suggest that it is "so certainly unfounded

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[4] S.C.Stat.Ann. § 12-47-440 provides a refund right to "*any taxpayer* [for] *any* license fee or tax imposed under this Title," (emphasis added). The court below held that § 12-47-440 creates a refund right only for "license-type" fees or taxes. App. A at 4a. It did so contrary to the plain language of the statute, contrary to the views of the South Carolina Tax Commission, App. F at 41a-47a (to whom the court ordinarily gives great deference, *see Etiwan Fertilizer Co. v. South Carolina Tax Comm'n*, 60 S.E.2d 682 (S.C. 1950)), contrary to the views of the South Carolina Attorney General, *see* Op.Atty.Gen. *James M. Waddell, Jr.* (Dec. 22, 1987), con-

that it may properly be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation District v. Canal Co.*, 243 U.S. 157, 164 (1917). *See also, Lawrence v. Tax Comm'n of Mississippi*, 286 U.S. 276, 282-83 (1932). But even accepting the state court's interpretation of § 12-47-440 at face value, petitioners nonetheless are entitled to relief.

As this Court recently reaffirmed in *McKesson*, federal due process requires that taxpayers be provided a "clear and certain remedy" for unlawful taxation. 110 S.Ct. at 2251. Under the facts of this case, petitioners' remedy was anything but "clear and certain." Immediately after *Davis* was decided, and through April 15, 1989, the South Carolina Tax Commission advised petitioners to pursue refund claims under § 12-47-440 (a fact the court below dismissed as "very unfortunate," App. A at 6a.) Never prior to this case (and indeed not even in the court's initial opinion in this case) had any court in South Carolina suggested that § 12-47-440 was limited with respect to the types of taxes recoverable. Rather, the court below had decided refund cases involving a number of different types of taxes: use taxes (*Colonial Stores v. South Carolina Tax Comm'n*, 168 S.E.2d 774 (S.C. 1979); in-

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trary to the views of the South Carolina Legislature in 1989 (when it enacted § 12-47-445 to preclude petitioners from obtaining relief under § 12-47-440) and in 1960 (when it enacted the predecessor of § 12-47-440 to create "an equitable system for submitting claims for refund for taxes and license fees," *see* "First Annual Report of the South Carolina Tax Study Commission to the 1960 General Assembly," Journal of the Senate at 46 (Jan. 12, 1960)), contrary to the views expressed by the Tax Section of the South Carolina Bar (appearing below as *amicus curiae*), and contrary to an uninterrupted string of judicial decisions construing § 12-47-440 broadly, *see, e.g., Guaranty Bank & Trust Co. v. South Carolina Tax Comm'n*, 173 S.E. 2d 367 (S.C. 1970) (income tax refund action under § 12-47-440); *Slater Corp. v. South Carolina Tax Comm'n*, 314 S.E.2d 31 (S.C. 1984) (granting refund of sales taxes, holding that § 12-47-440 provides for the "refund of any tax or license fee").

come taxes (*Guaranty Bank & Trust Co. v. South Carolina Tax Comm'n*, 173 S.E.2d 367; *Bobo Brothers v. South Carolina Tax Comm'n*, 244 S.E. 25 519 (S.C. 1978));[5] property taxes (*Newberry Mills, Inc. v. Dawkins*, 190 S.E.2d 503 (S.C. 1972); *Harrison v. South Carolina Tax Comm'n*, 199 S.E.2d 763 (S.C. 1973)); sales taxes (*Slater Corp. v. South Carolina Tax Comm'n*, 314 S.E.2d 31); soft drink taxes (*Shasta Beverages v. South Carolina Tax Comm'n*, 310 S.E.2d 655 (1983)). Indeed, in *Slater Corp.*, the court below held that "Section 12-47-440 provides [for the] application for refund of *any* tax or license fee." 314 S.E.2d at 33, (emphasis added). *See also* Boyle and Von Lehe, *South Carolina Income Taxation*, Third ed. (1987) at I-2 (noting that § 12-47-440 is an available route for obtaining a refund of income taxes.) And, perhaps most telling, at no point in this litigation did the State raise the issue of the putative inapplicability of § 12-47-440 in income tax cases.

Against this framework, petitioners had no "clear and certain remedy" for the unconstitutional taxes they were compelled to pay. Thus, even if the court below were correct that § 12-47-440 provided no statutory remedy, petitioners nonetheless would be entitled to relief directly under the Fourteenth Amendement. Accordingly, the asserted state law ground, even if tenable, does not provide an adequate means of disposing of petitioners' claims. Nor, contrary to the evident intent of the court below, does it impose any impediment to review by this Court.

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[5] The court below acknowledged that it had decided these two income tax cases, but noted that it did not authorize refunds in either case. App. A at 4a n.2. In both cases, however, the court refused refunds not because § 12-47-440 did not apply to income taxes, but instead because the conditions precedent to bringing suit under § 12-47-440 had not been satisfied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of South Carolina should be granted.

Respectfully submitted,

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April 24, 1992

APPENDICES

APPENDIX A

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

FRANCES EDWIN BASS, JR.; MARVIN L. JONES; JAMES R. MARVIN; WILTON A. HOCKENBERRY; CATHERINE LOUISE MOYERS; JOHN GILREATH; MILDRED B. JENKINS; J. LORING JENKINS, Individually and for the Benefit and on Behalf of all others Similarly Situated,

Respondents/Appellants,

v.

THE STATE OF SOUTH CAROLINA, a Body Politic, and the SOUTH CAROLINA TAX COMMISSION,

Appellants/Respondents.

On Remand from the United States Supreme Court

Opinion No. 23216

Heard October 30, 1991—Filed January 27, 1992

AFFIRMED

Chief Deputy Attorney General Joe L. Allen, Jr., Deputy Attorney General Ray N. Stevens and Assistant Attorney General Arlene D. Hand, all of Columbia, for Appellants/Respondents.

Gene M. Connell, Jr., and Edward T. Kelaher, both of Kelaher, Haar, Bass & Connell, of Surfside Beach, for Respondents/Appellants.

Scott Y. Barnes, of Holmes & Thompson, of Charelston; and William J. Quirk, of USC School of Law, of Colum-

bia, both for Amicus Curiae (Tax Section of the South Carolina Bar.)

PER CURIAM: This matter is before us on remand from the United States Supreme Court. In *Bass v. State*, 302 S.C. 250, 395 S.E.2d 171 (1990) (*Bass I*), we held that federal retirees were not entitled to a refund for income taxes paid pursuant to a statute which later was determined by the United States Supreme Court to be unconstitutional.[1] The federal retirees appealed our decision in *Bass I* to the United States Supreme Court. The Supreme Court granted the retirees' petition for certiorari, vacated our judgment in Bass I, and remanded the case to this Court for further consideration in light of *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ——, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991). This Court then issued an order requiring the parties to brief the following issues.

> (1) What is the impact of the *Beam* decision on this Court's prior decision in this case?;
>
> (2) Whether federal retirees are procedurally barred from recovery because they failed to proceed under the applicable state statute?;
>
> (3) Whether federal retirees were properly certified as a class under state law?; and
>
> (4) Whether there are any other possible procedural bars under state law to federal retirees' recovery?

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[1] The South Carolina statute granted retired federal employees a $3000.00 exemption of retirement income from South Carolina income tax while retired state employees received total exemption of their retirement income. In *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), the Supreme Court held that state taxation of income of persons retired from employment or service with the federal government at a greater rate than taxation of income of persons retired from state service, violated the doctrine of intergovernmental tax immunity and thus was constitutionally prohibited.

I. *DISCUSSION*

A. PROCEDURAL BAR

Initially, we note that our decision to affirm *Bass I* is based primarily on the adequate and independent state ground that the federal retirees are procedurally barred from recovery because they failed to proceed under the applicable state statute. *See Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) (requiring a plain statement that the state court decision rests upon adequate and independent state grounds). *See also Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (a state court may rely on a procedural bar as an independent basis for its disposition of the case).

As we stated in *Bass I*, the proper refund statutes under which the federal retirees should have proceeded are S.C. Code Ann. §§ 12-47-210 and 12-47-220 (1976). Section 12-47-210 provides, in pertinent part, "[w]hen the State or any county charges or levies *any tax whatsoever*" which the taxpayer conceives "to be unjust or illegal for any cause," the individual may pay the tax under protest. (emphasis added). Section 12-47-220 then states that "[a]ny person paying any taxes under protest may at any time *within thirty days* after making such payment, but *not* afterwards," bring an action for the recovery thereof. (emphasis added). However, instead of proceeding under §§ 12-47-210 and 12-47-220, the federal retirees chose to bring their refund action under S.C. Code Ann. § 12-47-440 (1976). Section 12-47-440 provides that "whenever it shall appear to any taxpayer that any *license fee or tax* imposed under this Title has been erroneously, improperly or illegally assessed, collected or otherwise paid over to the Commission," the taxpayer can seek a refund "within a period of three years from the date the license fee or tax was due to have been paid." (emphasis added).

The federal retirees contend that our case law supports the theory that a refund of income taxes can be recovered under Section 12-47-440, and that if we now hold that this statute is inapplicable, we would deny the retirees their due process rights. We disagree.

This Court has previously stated that "the exclusive remedy for contesting an alleged erroneous assessment of *income taxes* [is] by payment under protest of the tax claimed as illegal with Sections 65-2661 and 65-2662 of the Code." [predecessors of §§ 12-47-210 and 12-47-220]. *Perpetual Building & Loan Assoc. v. S.C. Tax Comm'n*, 255 S.C. 523, 526-27, 180 S.E.2d 195, 197 (1971). *See also City of Columbia v. Glen Falls Ins. Co.*, 245 S.C. 119, 139 S.E.2d 529 (1964) (the general statutory remedy for recovery of taxes illegally charged or assessed is found in Section 65-2661 *et seq.* of the 1962 Code of Laws). In fact, this Court has never awarded a taxpayer a refund of income taxes under Section 12-47-440.[2]

In every case brought pursuant to Section 12-47-440 (other than the two cases mentioned in footnote 2), the taxpayer was seeking a refund for license-type fees or taxes collected by the Commission. *See, e.g., Colonial Stores, Inc. v. S.C. Tax Comm'n*, 253 S.C. 14, 168 S.E.2d 774 (1969) (self-redeemer of trading stamps brought ac-

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[2] There have been two cases in which taxpayers unsuccessfully sought an income tax refund under Section 12-47-440, or its predecessor, Section 65-2684 of the 1962 Code. However, the issue of whether Section 12-47-440 was the appropriate statute was not raised in these cases and, in any event, would not have been reached, as the cases were dismissed because the taxpayer failed to comply with the prerequisites to recovery. *See Guaranty Bank & Trust Co. v. S.C. Tax Comm'n*, 254 S.C. 82, 173 S.E.2d 367 (1970) (Court sustained Tax Commission's demurrer because taxpayer failed to comply with condition precedent to recovery); *Bobo Bros., Inc. v. S.C. Tax Comm'n*, 271 S.C. 18, 244 S.E.2d 519 (1978) (Court sustained Tax Commission's demurrer because taxpayer failed to pay the disputed taxes as required by Section 12-47-440).

tion pursuant to Section 65-2684, the predecessor to Section 12-47-440, to recover license type/use taxes paid to the Commission); *Dale v. S.C. Tax Comm'n*, 276 S.C. 110, 276 S.E.2d 293 (1981) (action to recover documentary stamp tax); *Shasta Beverages v. S.C. Tax Comm'n*, 280 S.C. 48, 310 S.E.2d 655 (1983) (action to recover soft drinks license taxes); and *Duke Power Co. v. S.C. Tax Comm'n*, 292 S.C. 64, 354 S.E.2d 902 (1987) (action for a refund of corporate license fees). These cases support our conclusion that Section 12-47-440 is not a general refund statute, but instead, applies only to license type fees and taxes.

In contrast to the lack of authority supporting the retirees' claim that an income tax refund action can be brought pursuant to Section 12-47-440, there are numerous cases in which income tax refunds were sought pursuant to Section 12-47-210 and 12-47-220, or their predecessor statutes, Sections 65-2661 and 65-2662. For example, *see M. Lowenstein Corp. v. S.C. Tax Comm'n*, 298 S.C. 93, 378 S.E.2d 272 (Ct. App. 1989); *Dalton v. S.C. Tax Comm'n*, 295 S.C. 174, 367 S.E.2d 459 (Ct. App. 1988); *Pendarvis v. S.C. Tax Comm'n*, 285 S.Ct. 381, 329 S.E.2d 766 (1985). *See also* the cases cited in the Annotations following Sections 12-47-210 and 12-47-220.

Our decision in *Perpetual*, and our prior case law interpreting Section 12-47-440 and Sections 12-47-210 and 12-47-220, clearly demonstrate that this Court has never authorized an income tax refund action pursuant to Section 12-47-440 and always has required an individual seeking an income tax refund to proceed under Sections 12-47-210 and 12-47-220. Thus, contrary to the retirees' assertions, this Court's prior case law could not have misled the retirees into believeing that Section 12-47-440 was the appropriate statute under which to proceed, and, in fact, should have notified the retirees that the applicable statutes were Sections 12-47-210 and 12-47-220.

Despite the fact that this Court never authorized an income tax refund action pursuant to Section 12-47-440, the Tax Commission has issued administrative interpretations stating that Section 12-47-440 applies to income tax refunds. In addition, after the *Davis* decision was announced, the Tax Commission issued several press releases in which it advised the retirees that they could "protect themselves against the expiration of the three-year statute of limitation" by writing a letter to the Tax Commission or by filing an amended return for the 1985 tax year. The retirees contend that since the Tax Commission has previously interpreted Section 12-47-440 as applying to income taxes, it is estopped from now arguing that Section 12-47-440 does not apply to income taxes. While we agree with the retirees that it is very unfortunate the Tax Commission has instilled false hopes by advising persons that there is a three year statute of limitations for imcome tax refunds under Sections 12-47-440, we are not bound by the Tax Commission's misinterpretation of Section 12-47-440. Indeed, in light of our prior case law, we are obligated to correct this erroneous interpretation of Section 12-47-440.

The retirees also assert that allowing Section 12-47-440 to be used to refund only certain types of taxes violates the equal protection clause. This argument is meritless. If a statute treats all persons alike under like circumstances and conditions, it cannot be said to deprive anyone of equal protection of the laws. *Carter v. Linder*, 303 S.C. 119, 399 S.E.2d 423 (1990). Here, all members of the class of taxpayers seeking income tax refunds are treated alike, as they are all bound by the procedural requirements in Sections 12-47-210 and 12-47-220. The equal protection clause does not require a statute authorizing a refund for one type of tax to provide the identical procedural mechanisms which are provided in a separate statute for a different type of tax.

B. EFFECT OF *BEAM* DECISION

As we noted earlier, our decision rests primarily on an independent and adequate state ground. However, we discuss the effect of the *Beam* decision on our prior opinion as this was the basis of the remand from the Supreme Court.

The Georgia tax statute at issue in *Beam* imposed on an excise tax on imported liquor at a rate double that imposed on liquor manufactured from Georgia-grown products. In 1984, the Supreme Court, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), held that a similar Hawaii statute violated the Commerce Clause. Thereafter, James B. Beam Distilling Company, a manufacturer of Kentucky bourbon, filed an action in Georgia state court claiming that the Georgia statute also violated the Commerce Clause, and seeking a refund of taxes it paid under the Georgia statute for the years 1982-1984. The Court declared the statute unconstitutional under *Bacchus*, but refused to apply its ruling retroactively, thereby denying the requested refund. In so holding, the Court relied on *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), which held that a decision will be applied prospectively where it displaces a principle of law on which reliance may reasonably have been placed, and where prospectivity is on balance warranted by its effect on the operation of the new rule and by the inequities that might otherwise result from retroactive application. The Georgia Supreme Court affirmed. The parties then appealed to the United States Supreme Court, which reversed the judgment and remanded the case.

The only question presented in the *Beam* case was whether the Court's ruling in *Bacchus* should apply retroactively to claims arising on facts antedating that decision. Although it was a plurality opinion, a majority of the Court held that the application of the rule to the

parties in *Bacchus* mandated the application of the rule retroactively in later cases.

Justice Souter, joined by Justice Stevens, determined that retroactivity was a matter of choice of law, "a choice . . . between the principle of forward operation and that of relation backward." *Beam*, 501 U.S. at ——, 111 S.Ct. at 2443, 115 L.Ed.2d at 487 (citing *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed.2d 360, 366 (1932)). Justice Souter noted that there were three ways in which the choice of law problem could be resolved. First, a decision could be fully retroactive, applying both to the parties before the Court and to all others by and against whom claims are made without regard to when such claims arise. Second, a decision could be purely prospective, applying only to cases arising on facts postdating the pronouncement. Third, the new rule could be applied in the case in which it is pronounced, but not to other cases arising on facts predating the pronouncement.[3]

Justice Souter concluded that principles of equality and *stare decisis* required that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Id.* 501 U.S. at ——, 111 S.Ct. at 2448, 115 L.Ed.2d at 493. Thus, Justice Souter specifically rejected the notion of modified, or selective prospectivity. Justice Souter left open the question of the propriety of pure prospectivity.

Justice White concurred in the judgment, but specifically did not reject pure prospectivity, finding that the propriety of pure prospectivity was settled by prior cases. Justices Blackmun, Marshall, and Scalia, also concurred in the judgment, but these justices would apply every new rule announced retroactively. Finally, Justices O'Connor, Rehnquist, and Kennedy dissented, holding that in order to

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[3] This method is called modified, or selective, prospectively.

determine whether a rule should be applied retroactively, the Court must undertake a *Chevron Oil* inquiry.

Since six of the justices concurred in the judgment, we know that a majority of the Court agrees that if a rule is applied to the litigants in the case on appeal, this rule must then be applied retroactively in all subsequent cases, thus precluding a *Chevron Oil* analysis. Consequently, the question in this case is whether the rule announced in *Davis* was applied to the parties in that case such that retroactive application of *Davis* is mandated by *Beam*.

We hold that the rule announced in *Davis* was not applied to the parties in that case, and thus, that *Davis* can be applied prospectively. *Davis* differs from *Bacchus* in that the retroactivity issue was not presented in *Davis*, while this issue was before the Court in *Bacchus*. Further, in *Bacchus*, the Supreme Court applied its rule retroactively to the litigants in that case. Conversely, in *Davis*, the retroactivity issue was not before the Court because Michigan conceded that the refunds were due to Davis under state law if the statute were held unconstitutional. Because *Davis* did not rule upon the issue of retroactivity, the doctrine of *stare decisis* does not apply. *United States v. L.A. Tucker Truck Lines*, 344 U.S 33, 73 S.Ct. 67, 97 L.Ed. 54 (1952) (in order for a case to be a precedent for another case, the court in the first case must have decided the issue presented in the second case). Furthermore, the principle of equality or equal treatment to similarly situated litigants does not require that all future litigants, including the litigants in the present case, are bound by the stipulation of the State of Michigan in *Davis*.

This conclusion is supported by Michigan's own interpretation of *Davis*. In *Fonger v. Dept. of Treasury*, 1990 WL 96942 (Mich. Tax Tribunal June 11, 1990) (WESTLAW), the court stated:

> The Court in *Davis* made no specific determination as to whether its decision shall apply prospectively or

> retroactively. Therefore the Court did not mandate refunds to any or all federal retirees who paid Michigan income tax. Any inquiry involving the application of refunds was apparently extinguished by the Department's concession that refunds would retroactively apply based upon an unfavorable ruling by the Court . . . .

In addition, several other courts which have been faced with this issue have also held that *Beam* does not mandate retroactive application of *Davis*. *See Swanson v. North Carolina*, 329 N.C. 576, 407 S.E.2d 791 (1991); *Sheehy v. Montana*, 1991 WL 238253 (Mo. Sup. Ct. Nov. 14, 1991) (WESTLAW); *Harper v. Virginia Dept. of Taxation*, 1991 WL 230115 (Va. Sup. Ct. Nov. 8, 1991) (WESTLAW).

Therefore, because we find that the retroactivity issue was not decided in *Davis*, we are not foreclosed by precedent from applying the three-pronged *Chevron Oil* test in deciding the retroactivity issue in the present case.[4] *Accord*, *Swanson*, *supra*; *Sheehy*, *supra*; and *Harper*, *supra*. Thus, we adhere to our *Chevron Oil* analysis articulated in *Bass I*.

II. *CONCLUSION*

Our decision to affirm our prior decision in *Bass I* is based primarily on the adequate and independent state ground that the retirees are procedurally barred from recovery because they failed to proceed under the applicable state statute. However, we also hold that *Beam* does not mandate the retroactive application of *Davis*. As a result, we are free to utilize the *Chevron Oil* analysis to determine whether *Davis* can be applied prospectively. After having done such an analysis in *Bass I*, we conclude that *Davis* should be applied prospectively. However, even

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[4] We do not read *Beam* as rejecting the *Chevron Oil* test. Four Justices clearly embrace the test's viability in determining retroactivity.

if we are incorrect and the Supreme Court does interpret *Davis* as being retroactive, we would still deny the retirees' refund as they are procedurally barred from recovery.

Having reconsidered our July 31, 1990 decision in light of *Beam*, we conclude that nothing articulated in *Beam* requires a different result from that reached in our prior decision. Accordingly, our prior decision in *Bass I* is

AFFIRMED.

/s/ [Illegible]
C.J.

/s/ [Illegible]
A.J.

/s/ A. Lee Chandler
A. LEE CHANDLER
A.J.

/s/ [Illegible]
A.J.

/s/ [Illegible]
A.J.

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

June 28, 1991

Mr. Michael J. Kator
1275 K Street, N.W.
Suite 950
Washington, DC 20005-4006

Re: Francis Edwin Bass, Jr., et al.
v. South Carolina, et al.
No. 90-673

Dear Mr. Kator:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of South Carolina for further consideration in light of James B. Beam Distilling Company v. Georgia, 501 U. S. —— (1991).

Very truly yours,

/s/ William K. Suter
WILLIAM K. SUTER
Clerk

APPENDIX C

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

FRANCIS EDWIN BASS, JR.; MARVIN L. JONES; JAMES R. MARVIN, WILTON A. HOCKENBERRY; CATHERINE LOUISE MOYERS; JOHN GILREATH, MILDRED B. JENKINS; J. LORING JENKINS, individually and for the benefit of all others similarly situated,

Respondents/Appellants,

v.

STATE OF SOUTH CAROLINA, a body politic,
THE SOUTH CAROLINA TAX COMMISSION,

Appellants/Respondents.

Appeal From Horry County
Kaye G. Hearn, Judge
Sidney T. Floyd, Judge

Amended Opinion No. 23216

Heard May 7, 1990—Filed August 6, 1990

REVERSED

Chief Deputy Attorney General Joe L. Allen, Jr., Deputy Attorney General Ray N. Stevens, and Assistant Attorney General Arlene D. Hand, all of Columbia, for Appellants/Respondents.

Gene M. Connell, Jr., of Kelaher, Haar, Bass & Connell, of Surfside Beach, for Respondents/Appellants.

PER CURIAM: This action was commenced by federal retirees against the State of South Carolina and the South Carolina Tax Commission (hereafter, collectively referred to as the "State") on April 4, 1989. The action was brought because of a March 28, 1989 United States Supreme Court decision, *Davis v. Michigan Dept. of Treasury*, —— U.S. ——, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), in which it was held that state taxation of income of persons retired from employment or service with the federal government at a greater rate than the taxation of income of persons retired from state service, violated the doctrine of intergovernmental tax immunity and was thus constitutionally prohibited.

Prior to the *Davis* decision, South Carolina had a statute that granted retired federal employees a $3000.00 exemption of retirement income from South Carolina income tax while retired state employees received a total exemption of their retirement income from South Carolina income tax. Since the *Davis* decision, South Carolina's income statute that applies to state and federal retirees has been amended so as to comply with *Davis*. However, the federal retirees claimed and the trial court agreed that the federal retirees were entitled to a refund for income taxes paid during the tax years of 1985 through 1988 pursuant to one of South Carolina's refund statutes, S.C. Code Ann. § 12-47-440 (1976). Although both parties appeal, the primary issues before this Court are whether: (1) the *Davis* decision should be applied prospectively from March 28, 1989, so as to deny federal retirees refunds, and (2) the enactment of S.C. Code Ann. § 12-47-445 (1989) operates to bar the federal retirees' claim for refunds. We reverse the order of the trial court which granted federal retirees a re-

fund of income tax collected by the state for the years 1985 through 1988.

I. DISCUSSION

PROSPECTIVE APPLICATION OF DAVIS

The United States Supreme Court did not announce whether its decision in *Davis* had retrospective or prospective application because Michigan conceded that "to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." *Davis v. Michigan Dept. of Treasury*, —— U.S. at ——, 109 S.Ct. at 1508-1509, 103 L.Ed.2d at 906. Here however, there is no such concession. Therefore, in order to determine whether federal retirees are entitled to a refund for monies paid under South Carolina's former discriminatory tax laws, we must first determine whether the holding of *Davis* is to be applied retroactively or prospectively. The State argues that we should apply the test announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) (to determine whether *Davis* should be applied retrospectively or prospectively. By application of this test, the State contends that *Davis* need only be applied prospectively and the federal retirees would not be entitled to a refund. We agree.

Although this particular issue is one of first impression in this State, particularly in light of the fact that *Davis* was only recently decided, other courts such as the Arkansas Supreme Court in *American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), have been faced with a similar question. In *Gray*, the Arkansas Supreme Court was faced with whether to apply the United States Supreme Court opinion in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) retrospectively or prospectively. In *Scheiner*, the United States Supreme Court held that another state's highway

tax which treated truckers whose base of operation were outside the state, differently from those based in the taxing state, violated the commerce clause. In response to the *Scheiner* decision, the Arkansas Supreme Court struck a similar taxing provision in *Gray*. After applying the test announced in *Chevron* for determining whether a judicial decision should be applied retroactively or prospectively, the Arkansas Supreme Court held that the United States Supreme Court decision in *Scheiner* should have prospective application only. Consequently, out-of-state truckers were denied refunds of taxes paid prior to the United States Supreme Court decision in *Scheiner*.

The Georgia Supreme Court has also followed an analysise consistent with *Gray* in an action for a refund of taxes. In *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989), the distilling company sought a $2,400,000.00 refund for excise taxes paid in 1982, 1983, and 1984 pursuant to a Georgia statute, Ga. Code Ann. § 3-4-60 (1982), which imposed a higher tax on alcoholic beverages imported into Georgia than on those manufactured in Georgia. The statute was amended in 1985, shortly after the United States Supreme Court found a similar statute to be unconstitutional. *See, Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). The lower court found that the pre-1985 Georgia statute was unconstitutional because it violated the commerce clause of the United States Constitution, but that the ruling would only be applied prospectively so that the distilling company was not entitled to a refund.

On appeal, the distilling company argued that the lower court erred in applying the decision prospectively only and argued that Ga. Code Ann. § 48-2-35(a) (1982) which provides, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him

. . . ," mandated retroactive application of a constitutional decision. In rejecting the latter argument, the Georgia Supreme Court noted that the statute did not describe how it should be determined that a tax was "illegally assessed" and that the statute did not address the issue of retroactive versus prospective application of a constitutional decision.[1] In affirming the lower court's decision that the distilling company was not entitled to a refund, the Georgia Supreme Court first applied the test set forth in *Chevron* to determine whether to retroactively or prospectively apply a judicial decision, and found that only prospective application of the decision was appropriate. In holding that the decision should not be applied retroactively, the Georgia Supreme Court did not need to examine state law, primarily the refund statute, as to how to apply the decision retroactively.

Only one appellate court has had the opportunity to review specifically whether *Davis* should be applied retroactively or prospectively. In *Hackman v. Director of Revenue, State of Missouri*, 771 S.W.2d 77 (Mo. 1989), the Missouri Supreme Court held that under *Davis*, Missouri's tax scheme which discriminated between state and federal retirees, violated the principles of intergovernmental tax immunity, and that the federal retirees were entitled to a refund under its statute. Rather than addressing whether *Davis* was to be applied retrospectively or prospectively, the majority in *Hackman* made a "quantum leap" from a determination that Missouri's tax law was unconstitutional, to a determination that refunds were due vis-a-vis its interpretation of Missouri's refund statute. It appears that the majority in *Hackman* interpreted the Missouri refund statute as al-

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[1] S.C. Code Ann. § 12-47-440 (1976), under which the federal retirees proceed for their refund allows an action for taxes "erroneously, improperly or illegally assessed . . ." This statute like the one in *Beam*, does not address the issue of retroactive versus prospective application of a constitutional decision.

ways mandating a tax refund when a statutory scheme is found to be unconstitutional.

We find that the analysis employed by the majority in *Hackman* is flawed in that the majority should have first determined under *Chevron*, whether *Davis* should be retrospectively or prospectively applied. Only upon a finding that *Davis* is to be retrospectively applied would the court need to examine state law to determine how to apply the *Davis* holding retroactively. On the other hand, upon a finding that *Davis* should only be applied prospectively, no further inquiry is needed. This analysis is consistent with that used by the Arkansas Supreme Court in *Gray* and the Georgia Supreme Court in *Beam* and additionally, is consistent with that suggested by the dissenting opinion in *Hackman*.

Hence, we will proceed under the United States Supreme Court's three-pronged test which was set forth in *Chevron* to determine whether prospective application of *Davis* is warranted. *Chevron* sets forth three factors that must be considered in cases dealing with the retroactivity question:

(1) Consider whether the decision to be applied establishes a new principal of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

(2) Balance the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

(3) Weigh the inequity imposed by retroactive application, for if a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the in-

justice or hardship by a holding of nonretroactivity.

"It cannot be disputed that *Davis* represents both a new principle of law and a case of first impression." *Hackman v. Director of Revenue, State of Missouri*, 771 S.W.2d at 86 (Welliver, J., dissenting). The *Davis* decision for the first time, held that the doctrine of intergovernmental tax immunity applied to the retirement income of a federal retired employee. Prior to *Davis*, the State taxed some of the income of federal retirees and exempted the income of state retirees. This began in 1945 by the exemption of the benefits paid state retirees.[2] No similar provision existed that exempted all of the retirement income of federal retirees. During this time, federal retirees residing in South Carolina paid the tax without protest and did not raise the issue of intergovernmental tax immunity. Both the State and the federal retirees relied upon this tax treatment during this time. The *Davis* decision invalidated that clear past precedent and established a new principle of law. The first prong of the *Chevron* test is satisfied.

As to the second prong of the *Chevron* test, the Georgia Supreme Court in *Beam* held that it had no application "because the statute at issue was repealed . . ." Similar circumstances exist here. During all the years that the taxes were collected from the federal retirees, the State had no reason to believe the tax was unconstitutional. As soon as the State became aware of the unconstitutionality of the differential tax treatment between federal and state retirees, the legislature rectified the defects. Thus, the first and second prongs of the *Chevron* test appear to favor the prospective application of *Davis*.

All that remains to be considered is the third prong of *Chevron*, the weighing of the equities. If *Davis* is applied retroactively, the State faces liability for approxi-

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[2] Act No. 157, § 13, 1945 S.C. Acts 223.

mately $200,000,000.00 in refunds for taxes it collected in good faith under an unchallenged and presumptively valid statute. South Carolina would have to refund this sum for taxes already received which it has already spent for public purposes; many of these benefits have already been received by federal retirees residing in South Carolina. The refund of such an exorbitant amount would impose a severe financial burden on the State and its citizens as well as endanger the financial integrity of the State.

We find that all parts of the *Chevron* test have been met and weigh heavily in favor of the prospective [3] application of the new principle of law contained in the *Davis* decision. Because we have not applied *Davis* retroactively and no refund is mandated [4] under our analysis, there is no need to examine state law.

Even were we to examine state law, the federal retirees would be barred from receiving a refund. The

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[3] This court has previously refused to give a United States Supreme Court decision retroactive effect based upon the impact of the decision on the State. *See Wilson v. Jones*, 281 S.C. 230, 314 S.E.2d 341 (1984) (refusal to apply *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) retroactively because it "would disrupt the orderly process of probate" in South Carolina). *Wilson* has since been modified. *See, Mitchell v. Hardwick*, 297 S.C. 48, 374 S.E.2d 681 (1988).

[4] Although the federal retirees cite several United States Supreme Court cases for the proposition that the State cannot retain unconstitutionally collected taxes because a denial of refunds is itself a violation of constitutional rights, this argument is without merit. Those cases cited by the federal retirees for support of this proposition involve situations where the payment of taxes was made under protest or was compulsory (as where property is threatened to be seized or sold if taxes are not paid) rather than voluntary. *See Ward v. Board of County Com'rs of Love County*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920); *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931). In this case, the payments made by the federal retirees were voluntary, not coerced.

proper refund statutes under which the federal retirees should have proceeded are S.C. Code Ann. §§ 12-47-210 and 12-47-220 (1976), which require the taxpayer to pay under protest before bringing a refund action.[5] We have previously stated that the exclusive remedy for the recovery of the erroneous assessment of income taxes is through these "pay under protest" statutes. *See, Perpetual Bldg. & Loan Ass'n of Columbia v. South Carolina Tax Commission*, 255 S.C. 180 S.E.2d 195 (1971). The recent United States Supreme Court case of *McKesson Corp. v. Division of Alcoholic Beverage and Tobacco*, Op. No. 88-192 (U.S. filed June 4, 1990) reaffirms a state's ability to establish procedural requirements which must be complied with before a refund action is permitted. Here, the federal retirees did not comply with the "pay under protest" procedural mandates.

II. CONCLUSION

Under the *Chevron* test, we find that *Davis* is to be prospectively applied from the date the opinion was rendered, March 28, 1989, and that the federal retirees are not entitled to a refund of income taxes collected prior to that time.[6] Because we find that *Davis* is not to be retrospectively applied, we do not need to engage in an analysis of state law. Further, as the federal retirees are not entitled to relief, we do not need to address whether this action was properly maintained as a class action or whether the trial judge applied the proper interest rate to the refunds. The order of the trial court which granted the federal retirees a refund of income

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[5] Section 12-47-440 under which the federal retirees proceeded, deals only with the recovery of license fees and taxes. *See, City of Columbia v. Glens Falls Insurance Company*, 245 S.C. 119, 139 S.E.2d 529 (1964).

[6] In *American Trucking Associations, Inc. v. Smith*, Op. No. 88-325 (U.S. filed June 4, 1990), the United States Supreme Court followed a *Chevron* analysis consistent with that employed by this Court.

tax collected by the State for the years 1985 through 1988 is

REVERSED.

/s/ [Illegible], C.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

THE SUPREME COURT OF SOUTH CAROLINA

FRANCIS EDWIN BASS, JR.; MARVIN L. JONES; JAMES R. MARVIN, WILTON A. HOCKENBERRY; CATHERINE LOUISE MOYERS; JOHN GILREATH, MILDRED B. JENKINS; J. LORING JENKINS, individually and for the benefit of all others similarly situated,

Respondents/Appellants,

v.

STATE OF SOUTH CAROLINA, a body Politic, and THE SOUTH CAROLINA TAX COMMISSION,

Appellants/Respondents.

ORDER

The petition for rehearing in the matter of *Bass, et al. v. State of South Carolina, etc., et al.*, Op. No. 23216 (S.C. filed May 23, 1990) is denied. Additionally, the above referenced opinion is withdrawn and the following amended opinion is hereby issued in its place with additions or changes being made at the following places:

Page 2; Line 9 (Changes Made).

Pages 5-6 (Paragraph Added).

Page 6 (Footnote Nos. 5 and A Added).

/s/ [Illegible], C.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

Columbia, South Carolina

July 31, 1990

APPENDIX D

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

FRANCIS EDWIN BASS, JR.; MARVIN L. JONES; JAMES R. MARVIN, WILTON A. HOCKENBERRY; CATHERINE LOUISE MOYERS; JOHN GILREATH, MILDRED B. JENKINS; J. LORING JENKINS, individually and for the benefit of all others similarly situated,

Respondents/Appellants,

v.

STATE OF SOUTH CAROLINA, a body Politic, and THE SOUTH CAROLINA TAX COMMISSION,

Appellants/Respondents.

Appeal From Horry County
Kaye G. Hearn, Judge
Sidney T. Floyd, Judge

Opinion No. 23216

Heard May 7, 1990—Filed May 23, 1990

REVERSED

Chief Deputy Attorney General Joe L. Allen, Jr., Deputy Attorney General Ray N. Stevens, and Assistant Attorney General Arlene D. Hand, all of Columbia, for Appellants/Respondents.

Gene M. Connell, Jr., of Kelaher, Haar, Bass & Connell, of Surfside Beach, for Respondents/Appellants.

PER CURIAM: This action was commenced by federal retirees against the State of South Carolina and the South Carolina Tax Commission (hereafter, collectively referred to as the "State") on April 4, 1989. The action was brought because of a March 28, 1989 United States Supreme Court decision, *Davis v. Michigan Dept. of Treasury*, —— U.S. ——, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), in which it was held that state taxation of income of persons retired from employment or service with the federal government at a greater rate than the taxation of income of persons retired from state service, violated the doctrine of intergovernmental tax immunity and was thus constitutionally prohibited.

Prior to the *Davis* decision, South Carolina had a statute that granted retired federal employees a $3000.00 exemption of retirement income from South Carolina income tax while retired state employees received a total exemption of their retirement income from South Carolina income tax. Since the *Davis* decision, South Carolina's income statute that applies to state and federal retirees has been amended so as to comply with *Davis*. However, the federal retirees claimed and the trial court agreed that the federal retirees were entitled to a refund for income taxes paid during the tax years of 1985 through 1988 pursuant to South Carolina's refund statute, S.C. Code Ann. § 12-47-440 (1976). Although both parties appeal, the primary issues before this Court are whether: (1) the *Davis* decision should be applied prospectively from March 28, 1989, so as to deny federal retirees refunds, and (2) the enactment of S.C. Code Ann. § 12-47-445 (1989) operates to bar the federal retirees' claim for refunds. We reverse the order of the

trial court which granted federal retirees a refund of income tax collected by the state for the years 1985 through 1988.

I. DISCUSSION

PROSPECTIVE APPLICATION OF DAVIS

The United States Supreme Court did not announce whether its decision in *Davis* had retrospective or prospective application because Michigan conceded that "to the extent appellant had paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." *Davis v. Michigan Dept. of Treasury*, —— U.S. at ——, 109 S.Ct. at 1508-1509, 103 L.Ed.2d at 906. Here however, there is no such concession. Therefore, in order to determine whether federal retirees are entitled to a refund for monies paid under South Carolina's former discriminatory tax laws, we must first determine whether the holding of *Davis* is to be applied retroactively or prospectively. The State argues that we should apply the test announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) to determine whether *Davis* should be applied retrospectively or prospectively. By application of this test, the State contends that *Davis* need only be applied prospectively and the federal retirees would not be entitled to a refund. We agree.

Although this particular issue is one of first impression in this State, particularly in light of the fact that *Davis* was only recently decided, other courts such as the Arkansas Supreme Court in *American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), have been faced with a similar question. In *Gray*, the Arkansas Supreme Court was faced with whether to apply the United States Supreme Court opinion in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) retrospectively or prospectively. In *Scheiner*, the United States Supreme Court held that another state's highway tax which treated

truckers whose base of operation were outside the state, differently from those based in the taxing state, violated the commerce clause. In response to the *Scheiner* decision, the Arkansas Supreme Court struck a similar taxing provision in *Gray*. After applying the test announced in *Chevron* for determining whether a judicial decision should be applied retroactively or prospectively, the Arkansas Supreme Court held that the United States Supreme Court decision in *Scheiner* should have prospective application only. Consequently, out-of-state truckers were denied refunds of taxes paid prior to the United States Supreme Court decision in *Scheiner*.

The Georgia Supreme Court has also followed an analysis consistent with *Gray* in an action for a refund of taxes. In *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989), the distilling company sought a $2,400,000.00 refund for excise taxes paid in 1982, 1983, and 1984 pursuant to a Georgia statute, Ga. Code Ann. § 3-4-60 (1982), which imposed a higher tax on alcoholic beverages imported into Georgia than on those manufactured in Georgia. The statute was amended in 1985, shortly after the United States Supreme Court found a similar statute to be unconstitutional. *See, Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). The lower court found that the pre-1985 Georgia statute was unconstitutional because it violated the commerce clause of the United States Constitution, but that the ruling would only be applied prospectively so that the distilling company was not entitled to a refund.

On appeal, the distilling company argued that the lower court erred in applying the decision prospectively only and argued that Ga. Code Ann. § 48-2-35(a) (1982) which provides, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him . . .," mandated retroactive application of a constitutional de-

cision. In rejecting the latter argument, the Georgia Supreme Court noted that the statute did not describe how it should be determined that a tax was "illegally assessed" and that the statute did not address the issue of retroactive versus prospective application of a constitutional decision.[1] In affirming the lower court's decision that the distilling company was not entitled to a refund, the Georgia Supreme Court first applied the test set forth in *Chevron* to determine whether to retroactively or prospectively apply a judicial decision, and found that only prospective application of the decision was appropriate. In holding that the decision should not be applied retroactively, the Georgia Supreme Court did not need to examine state law, primarily the refund statute, as to how to apply the decision retroactively.

Only one appellate court has had the opportunity to review specifically whether *Davis* should be applied retroactively or prospectively. In *Hackman v. Director of Revenue, State of Missouri*, 771 S.W.2d 77 (Mo. 1989), the Missouri Supreme Court held that under *Davis*, Missouri's tax scheme which discriminated between state and federal retirees, violated the principles of intergovernmental tax immunity, and that the federal retirees were entitled to a refund under its statute. Rather than addressing whether *Davis* was to be applied retrospectively or prospectively, the majority in *Hackman* made a "quantum leap" from a determination that Missouri's tax law was unconstitutional, to a determination that refunds were due vis-a-vis its interpretation of Missouri's refund statute. It appears that the majority in *Hackman* interpreted the Missouri refund statute as always mandating a tax refund when a statutory scheme is found to be unconstitutional.

---

[1] S.C. Code Ann. § 12-47-440 (1976), under which the federal retirees proceed for their refund allows an action for taxes "erroneously, improperly or illegally assessed . . ." This statute like the one in *Beam*, does not address the issue of retroactive versus prospective application of a constitutional decision.

We find that the analysis employed by the majority in *Hackman* is flawed in that the majority should have first determined under *Chevron*, whether *Davis* should be retrospectively or prospectively applied. Only upon a finding that *Davis* is to be retrospectively applied would the court need to examine state law to determine how to apply the *Davis* holding retroactively. On the other hand, upon a finding that *Davis* should only be applied prospectively, no further inquiry is needed. This analysis is consistent with that used by the Arkansas Supreme Court in *Gray* and the Georgia Supreme Court in *Beam* and additionally, is consistent with that suggested by the dissenting opinion in *Hackman*.

Hence, we will proceed under the United States Supreme Court's three-pronged test which was set forth in *Chevron* to determine whether prospective application of *Davis* is warranted. *Chevron* sets forth three factors that must be considered in cases dealing with the retroactively question:

(1) Consider whether the decision to be applied establishes a new principal of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

(2) Balance the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

(3) Weigh the inequity imposed by retroactive application, for if a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of nonretroactivity.

"It cannot be disputed that *Davis re*presents both a new principle of law and a case of first impression." *Hackman v. Director of Revenue, State of Missouri*, 771 S.W.2d at 86 (Welliver, J., dissenting). The *Davis* decision for the first time, held that the doctrine of intergovernmental tax immunity applied to the retirement income of a federal retired employee. Prior to *Davis*, the State taxed some of the income of federal retirees and exempted the income of state retirees. This began in 1945 by the exemption of the benefits paid state retirees.[2] No similar provision existed that exempted all of the retirement income of federal retirees. During this time, federal retirees residing in South Carolina paid the tax without protest and did not raise the issue of intergovernmental tax immunity. Both the State and the federal retirees relied upon this tax treatment during this time. The *Davis* decision invalidated that clear past precedent and established a new principle of law. The first prong of the *Chevron* test is satisfied.

As to the second prong of the *Chevron* test, the Georgia Supreme Court in *Beam* held that it had no application "because the statute at issue was repealed . . ." Similar circumstances exist here. During all the years that the taxes were collected from the federal retirees, the State had no reason to believe the tax was unconstitutional. As soon as the State became aware of the unconstitutionality of the differential tax treatment between federal and state retirees, the legislature rectified the defects. Thus, the first and second prongs of the *Chevron* test appear to favor the prospective application of *Davis*.

All that remains to be considered is the third prong of *Chevron*, the weighing of the equities. If *Davis* is applied retroactively, the State faces liability for approximately $200,000,000.00 in refunds for taxes it collected in good faith under an unchallenged and presumptively valid

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[2] Act No. 157, § 13, 1945 S.C. Acts 223.

statute. South Carolina would have to refund this sum for taxes already received which it has already spent for public purposes; many of these benefits have already been received by federal retirees residing in South Carolina. The refund of such an exorbitant amount would impose a severe financial burden on the State and its citizens as well as endanger the financial integrity of the State.

We find that all parts of the *Chevron* test have been met and weigh heavily in favor of the prospective [3] application of the new principle of law contained in the *Davis* decision. Because we have not applied *Davis* retroactively and no refund is mandated [4] under our analysis, there is no ned to examine state law.

II. CONCLUSION

Under the *Chevron test*, we find that *Davis* is to be prospectively applied from the date the opinion was rendered, March 28, 1989, and that the federal retirees are

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[3] This court has previously refused to give a United States Supreme Court decision retroactive effect based upon the impact of the decision on the State. *See Wilson v. Jones*, 281 S.C. 230, 314 S.E.2d 341 (1984) (refusal to apply *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) retroactively because it "would disrupt the orderly process of probate" in South Carolina). *Wilson* has since been modified. *See, Mitchell v. Hardwick*, 297 S.C. 48, 374 S.E.2d 681 (1988).

[4] Although the federal retirees cite several United States Supreme Court cases for the proposition that the State cannot retain unconstitutionally collected taxes because a denial of refunds is itself a violation of constitutional rights, this argument is without merit. Those cases cited by the federal retirees for support of this proposition involve situations where the payment of taxes was made under protest or was compulsory (as where property is threatened to be seized or sold if taxes are not paid) rather than voluntary. *See Ward v. Board of County Com'rs of Love County*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920); *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931). In this case, the payments made by the federal retirees were voluntary, not coerced.

not entitled to a refund of income taxes collected prior to that time. Because we find that *Davis* is not to be retrospectively applied, we do not need to engage in an analysis of state law. Further, as the federal retirees are not entitled to relief, we do not need to address whether this action was properly maintained as a class action or whether the trial judge applied the proper interest rate to the refunds. The order of the trial court which granted the federal retirees a refund of income tax collected by the State for the years 1985 through 1988 is

REVERSED.

/s/ [Illegible] C.J.

/s/ [Illegible] A.J.

/s/ [Illegible] A.J.

/s/ [Illegible] A.J.

/s/ [Illegible] A.J.

APPENDIX E

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Case No. 89-CP-26-1136

FRANCIS EDWIN BASS, JR.; MARVIN L. JONES; JAMES R. MARVIN, WILTON A. HOCKENBERRY; CATHERINE LOUISE MOYERS; JOHN GILREATH; MILDRED B. JENKINS; J. LORING JENKINS, individually and for the benefit and on behalf of all others similarly situated,

Plaintiffs,

versus

STATE OF SOUTH CAROLINA, a body politic, and the SOUTH CAROLINA TAX COMMISSION,

Defendants.

ORDER FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY GRANTED TO THE PLAINTIFFS' AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DENIED

This is a class action brought by federal retirees to recover, prusuant to § 12-47-440, South Carolina Code of Laws, 1976, income taxes paid to the state upon retirement or pension income. Causes of action as to conversion and 42 U.S.C. § 1983 have been voluntarily dismissed without prejudice by the Plaintiffs with the ap-

proval of the Court. I find the Plaintiff class is entitled to partial summary judgment as to liability and order the Defendants to effect refunds of all taxes paid by class members on such income for the years 1985 through 1988.

This lawsuit was brought after the recent United States Supreme Court decision of *Davis v. Michigan Dept. of Treasury*, —— U.S. ——, 109 S.Ct. 1500, 103 L.Ed. 2d 891 (1989). In that case, the Court held that 4 U.S.C. § 111 precludes states from taxing the income of a retired federal employee differently than the income of a retired state employee. The South Carolina Income Tax statutes have required retired federal employees to pay income taxes while retired state employees were exempt. The South Carolina legislature corrected the tax statutes; however, Plaintiffs have filed this action for refunds of taxes paid for the last four years pursuant to § 12-47-440 of the South Carolina Code of Laws, 1976.

It is significant that the statutes have been amended by the General Assembly since the publication of the *Davis* opinion and the bringing of this class action. State and federal retirees' pension are now taxed equally. The statutes appear below in their pre-amendment form.

> § 9-1-1680. EXEMPTION FROM TAXATION AND LEGAL PROCESS: ASSIGNMENT. The right of a person to an annuity or retirement allowance or to the return of contributions, an annuity or retirement itself, any optional benefits, or any other right accrued or accruing to any person under the provisions of this chapter, and the monies of the system created hereunder are hereby exempted of any state or municipal tax, . . .
>
> § 12-7-435. DEDUCTIONS. There is allowed as a deduction from South Carolina taxable income of an individual the following amounts:
>
> a. Any retired person, or his surviving spouse, who receives a federal civil service retirement an-

nuity is allowed to deduct from taxable income Three Thousand and No/100 ($3,000.00) Dollars of the annuity received each taxable year exclusive of any exemption. . .

b. Any person retired from the uniformed services of the United States with 20 or more years active duty service, or his surviving spouse, is allowed to deduct from taxable income Three Thousand and No/100 ($3,000.00) Dollars of his uniformed services retirement pay received each taxable year. . .

* * *

d. All amounts received from the South Carolina Retirement System as provided in Title 9. . .

A review of these statutes reveals no difference in comparison to the statutes of Michigan which were struck down in *Davis*. The *Davis Court* stated that significant differences must exist between classes to justify dissimilar tax treatment. In this light, I am mindful that equal protection and due process concerns bear on the issues before me. *See, Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 52 S. Ct. 133, 76 L.E. 265 (1931); *Allegheny Pittsburgh Coal Company v. County Commission*, —— U.S. ——, 109 S.Ct. 633 (1989).

The Courts of Missouri, Arkansas, and Arizona have all considered issues identical to those in this case and have ordered refunds pursuant to *Davis*. The statutory refund procedures of each of these states are substantially identical to those of South Carolina in that each provides an applicable statute of limitations for refunds, each requires a claim to be filed with the Tax Commission, and each addresses circumstances upon which refunds will be appropriate. *See, Hackman v. Director of Revenue and the State of Missouri*, Opinion No. 71628, filed May 25, 1989; *Stanley Bosnick as Class Representative v. State of Arkansas*, Opinion No. 89-1451, filed

November 16, 1989; and *Bohn v. Waddell*, Superior Court of Arizona, Opinion No. TX 89-00050, Maricopa County, August 15, 1989.

At least 43,857 applicants have already filed for refunds pursuant to § 12-47-440 for the years 1985 through 1988. The majority of those refund applicants were filed between the date the *Davis* decision was published and the date of enactment of § 12-47-445, June 8, 1989. I find that each individual class member who has filed a refund application for the years 1985 through 1988, or who shall henceforth properly file such an application within statute of limitations periods, is entitled to a refund in such amounts as he or she were illegally or improperly assessed.

Section 12-47-440 states that any tax erroneously, improperly or illegally assessed may be refunded. Substantial case law in this state is in accord that taxes which were erroneously, illegally or improperly assessed should be refunded. *See, American Hardware Supply Co. v. Whitmire*, 278 S.C. 607, 300 S.E.2d 289 (1983); *Meredith v. Elliott*, 247 S.C. 335, 147 S.E.2d 244 (1965); *Multi-Cinema Ltd. v. S.C. Tax Commission*, 292 S.C. 411, 359 S.E.2d (1988).

Another issue before me concerns § 12-47-445. It states:

> A. Article 5, Chapter 47, Title 12 of the 1976 Code is amended by adding:
>
> "§ 12-47-445. The provision of § 12-47-440 do not apply to claims for abatement or refund resulting from a decision of a court of competent jurisdiction declaring a tax law of this state unconstitutional or otherwise unlawful. For purposes of this section, a final decision is the decision of a court declaring the law unconstitutional or otherwise unlawful and from which the appropriate officials of this state cannot or do not take an appeal or request a rehearing."

B. This section takes effect upon approval by the Governor.

Section 12-47-445 was not effective until it was signed by the Governor on June 8, 1989 and does not effect the taxes on retirement and pension income paid by the Plaintiff class for the years 1985 through 1988. Recent Supreme Court decisions involving the Tax Commission have held that individuals filing prior to the effective date of new tax legislation are entitled to protection under the previous law. *See, South Carolina National Bank v. South Carolina Tax Commission,* —— S.C. ——, 376 S.E.2d 512, (1989).

If § 12-47-445 were retroactive, it would have the effect of cutting off vested rights. *See, Vogel v. City of Myrtle Beach,* 391 S.C. 229, 353 S.E.2d 137 (1983). There also would be grave constitutional questions. *See, Duke Power Company v. South Carolina Tax Commission,* 81 F. 2d 513 (1936); *Bradley v. School Board of the City of Richmond,* 416 U.S. 696, 94 S.Ct. 2006 (1974). The law in South Carolina provides that statutes are to be construed prospectively and not retroactively unless there is clear legislative intent. I will not construe § 12-47-445 to apply to any refunds for the period from 1985 through 1988 without express statutory provisions and I further find that those individuals who filed refund applications after the enactment of § 12-47-445 shall be entitled to refunds for taxes paid before the enactment of that particular section.

I have reviewed examples of retroactive tax legislation including § 12-37-27 which specifically provided that it would affect vehicle registrations and license plates prior to its effective date. I find no such clear pronouncement in § 12-47-445 and am required to construe this statute as prospective. *See, Bartley v. Bartley Logging Co.,* 293 S.C. 88, 359 S.E.2d 55, (1987); *Boyd v. Boyd,* 277 S.C. 416, 289 S.E.2d 153 (1982); *Lindsay v. National Old*

Line Insurance Co., 262 S.C. 621, 207 S.E.2d 75 (1974). I am further satisfied that § 12-47-445 only amends and does not destroy the right of this Court to order tax refunds under § 12-47-440.

South Carolina law states that taxing statutes are not to be construed beyond the clear import of their language. Any substantial doubt as to the meaning of tax statutes is to be resolved in favor of the taxpayer. *Southeastern Fire Insurance Co. v. South Carolina Tax Commission*, 253 S.C. 407, 171 S.E.2d 355 (1969); *Ryder Truck Lines v. South Carolina Tax Commission*, 248 S.C. 148 (1966), 149 S.E.2d 435 (1966). The law in this state also provides that statutes authorizing suit for recovery of taxes paid will be liberally construed in the favor of the taxpayer. *Columbia Gas Light Company v. Mobley*, 139 S.C. 197, 137 S.E. 211 (1927); *Cooper River Bridge v. South Carolina Tax Commission*, 182 S.C. 72, 188 S.E. 508 (1936).

Our Supreme Court has further stated that the tax laws shall never be construed to require an individual class to contribute more than its fair share of the public burden. *Crescent Manufacturing Company v. Tax Commission*, 124 S.C. 761, 129 S.E. 480 (1924).

All of these cases bring me to the conclusion that § 12-47-445 is to be construed as prospective only and is not to effect any of the refund claims for the years 1985 through 1988, regardless of whether they were filed before or after the enactment of § 12-47-445. The feeling of this Court was echoed in a recent tax refund case, *Pittsburgh and Midway Coal Mining Company v. Arizona Department of Revenue*, Arizona Supreme Court No. CV-87-0460-PR, filed July 13, 1989. In that case, the Arizona Court of Appeals stated:

> "An honorable government would not keep taxes to which it is not entitled and the legislative scheme supports that result." *Id.* at 12.

I further note that this decision needs to address only refunds of taxes pursuant to § 12-47-440 since the legislature has corrected the relevant laws to provide that federal retirees and state retirees are taxed equally. I do not need to decide whether the prior statutes are unconstitutional.

The Court is not unmindful that this is a unique case. However, we are benefited by the guidance of the highest judicial authority in this country as embodied in *Davis v. Michigan*, *supra*. I understand the plight of the state, but am compelled by the authorities presented to order refunds for all members of this class. Ultimately, this decision is based on a view of fairness and equity as it appears that the interest of one class of citizens has been systematically denied in favor of a second class.

Based on the foregoing, it is

ORDERED that the partial summary judgment sought by the Plaintiff class as to liability is granted and Defendants' Motion for Summary Judgment is denied. It is

FURTHER ORDERED that all class members (approximately 43,857) who are stipulated to have filed refund applications be refunded such tax amounts as may be appropriate for each plus prejudgment interest at 6% per annum from the date those taxes were paid pursuant to § 12-47-60 of the South Carolina Code of Laws. Post judgment interest is awarded at the same interest rate; however, it will cease when the Defendants form the interest bearing common fund. It is.

FURTHER ORDERED that class members who have filed or who shall file, refund applications for years 1985 through 1988, after June 8, 1989, but within applicable statute of limitations time frames, shall be refunded such tax amounts as may be appropriate plus interest. It is

FURTHER ORDERED that the Defendants are to submit to the Court, within sixty (60) days, a plan for providing notice to all class members of their rights to refunds and as to the establishment of an interest-bearing common fund to be used to deposit and distribute such refunds in an orderly fashion. The amounts to be placed in the common fund shall be determined by the Defendants, subject to any objection by the Plaintiff class and review by the Court, and the common fund shall be increased as subsequent refund applications are received for the years 1985 through 1988. The costs of the notices and related expenses to all class members shall be borne *pro rata* by the Plaintiff class members and shall be deducted from the common fund as shall attorney's fees for Plaintiffs' counsel which shall be determined at a separate hearing.

AND IT IS SO ORDERED.

/s/ _____

SIDNEY T. FLOYD
Resident Judge of the
Fifteenth Judicial Circuit

January 19, 1990

Conway, South Carolina

APPENDIX F

RESPONDENTS/APPELLANTS' "EXHIBIT 4"

SOUTH CAROLINA TAX COMMISSION

NEWS RELEASE

301 Gervais St., P.O. Box 126, Columbia, SC 29214

For release:

April 2, 1989
URGENT

Contact:

(803) 737-4406

Vicki Jinnette
(Media Use Only)

NO CHANGE IN STATE'S TREATMENT OF FEDERAL RETIREMENT BENEFITS

South Carolina income tax laws affecting federal civil service retirement benefits have not changed as a result of a United States Supreme Court ruling. The South Carolina Tax Commission will continue to enforce state laws exempting $3,000 of federal civil service pensions while allowing state employee pensions to be fully exempt from state income tax.

The Supreme Court on March 28 ruled that a Michigan law taxing state and federal pensions differently was unconstitutional. The ruling affects at least 14 states, including South Carolina.

A change in South Carolina's income tax laws will require action by the state legislature. Until such action occurs, taxpayers should not do anything differently with their 1988 state income tax return or their 1989 estimated tax payments.

The Tax Commission does not have the authority to issue refunds on federal retirement benefits for 1988 or

any prior years until directed to do so by the courts or the General Assembly. No refunds will be made under the current law in South Carolina.

To protect themselves against the expiration of the three-year statute of limitation, taxpayers can file a South Carolina amended tax return for the 1985 tax year by April 15, 1989. These amended returns will be held for review.

The Tax Commission is currently studying the Supreme Court ruling and conferring with the state legislature on its impact on South Carolina. As changes occur, the Tax Commission will thoroughly advise taxpayers on their rights and obligations towards federal retirement benefits.

Current state law exempts $3,000 of federal retirement benefits for civil service retirees and for military retirees with 20 years of active duty service. Based on statistics from the federal government, there are approximately 65,000 federal retirees living in South Carolina. It is estimated that fully exempting all federal pensions would cost the state approximately $25-$30 million in revenue each year.

To file a 1985 amended return, taxpayers should complete form SC1040X and mail it no later than April 15 to a special post office box established by the Tax Commission for this purpose. The mailing address is: SCTC-FRA, P.O. Box 12265, Columbia, SC 29211-2265.

RESPONDENTS/APPELLANTS' "EXHIBIT 5"

SOUTH CAROLINA TAX COMMISSION

NEWS RELEASE

301 Gervais St., P.O. Box 125, Columbia, SC 29214

For release:
April 5, 1989

Contact:
(803) 737-4406

Vicki Jinnette
(Media Use Only)

HOW FEDERAL RETIREES CAN PROTECT A POSSIBLE 1985 REFUND

The United States Supreme Court on March 28 ruled that states must provide for equal taxation of federal and state retirement benefits. The ruling affects at least 14 states, including South Carolina.

South Carolina's legislature is currently examining the impact of the ruling on the state's tax laws and its potential effect on state revenue. At this time, however, no laws have been changed and taxpayers must report their federal retirement benefits as income on their 1988 income tax return as they have done in the past.

If state law is changed to exempt federal retirement benefits from South Carolina income tax, taxpayers may be eligible for a refund of taxes paid on those benefits.

To protect themselves against the expiration of the three-year statute of limitation, taxpayers have two options to protect a possible refund for the 1985 year:

1. The federal retiree may write a letter to the South Carolina Tax Commission, including the following information: 1) Name, 2) Address, 3) Social Security number, 4) year for which they are applying for a re-

fund (in this case, 1985), and 5) state in the letter that a refund is being sought for taxes paid on federal retirement benefits.

2. The federal retiree may file an amended return, Form SC1040X, for the 1985 year. The return should include the 1) Name, 2) Address, 3) Social Security number, 4) state on the back of the return that a refund is being sought for taxes paid on federal retirement benefits, and 5) on line 23, enter the figure "$1+".

Taxpayers may choose which one of the two methods is simpler for them. Letters or amended returns must be postmarked no later than April 15, 1989, to protect the statute.

Letters and amended returns should be mailed to:

SCTC - FRA

P.O. Box 12265

Columbia, S.C. 29211-2265

RESPONDENTS/APPELLANTS' "EXHIBIT 6"

SOUTH CAROLINA TAX COMMISSION

NEWS RELEASE

301 Gervais St., P.O. Box 125, Columbia, SC 29124

For release:
April 10, 1989

Contact:

Vicki Jinnette
(Media Use Only)

NO CHANGE IN STATE'S TREATMENT OF FEDERAL RETIREMENT BENEFITS

South Carolina income tax laws affecting federal civil service retirement benefits have not changed as a result of a United States Supreme Court ruling. The South Carolina Tax Commission will continue to enforce state laws exempting $3,000 of federal civil service pensions while allowing state employee pensions to be fully exempt from state income tax.

The Supreme Court on March 28 ruled that a Michigan law taxing state and federal pensions differently was unconstitutional. The ruling affects at least 15 states, including South Carolina.

A change in South Carolina's income tax laws will require action by the state legislature or the courts. Until such action occurs, taxpayers should not do anything differently with their 1988 state income tax return or their 1989 estimated tax payments.

The Tax Commission does not have the authority to issue refunds on federal retirement benefits for 1988 or any prior years until directed to do so by the courts or the General Assembly. No refunds will be made under the current law in South Carolina.

To protect themselves against the expiration of the three-year statute of limitation, taxpayers can file a South Carolina amended tax return, Form SC1040X, for the 1985 tax year by April 15, 1989. The return should include: 1) Name, 2) Address, 3) Social Security number, 4) state on the back of the return that a refund is being sought for taxes paid on federal retirement benefits, and 5) on line 23, enter the figure "$1+". It is not necessary at this time to fully complete the form.

Taxpayers may also protect the statute by writing a letter to the Tax Commission, giving the following information: 1) Name, 2) Address, 3) Social Security number, 4) year for which they are seeking a refund (in this case, 1985), and 5) state in the letter that a refund is being sought for taxes paid on federal retirement benefits. The letter should be signed by the federal retiree and dated.

No extension of the April 15, 1989, deadline for filing protective claims has been granted.

Taxpayers may choose which one of the two methods is simpler for them. The Tax Commission will hold the amended returns and letter filed as protective claims until further action is necessary. All taxpayers filing a protective claim will be notified by letter of the outcome of this situation once it has been resolved.

Letters and amended returns should be mailed no later than April 15 to SCTC - FRA, P.O. Box 12265, Columbia, SC 29211-2265.

The Tax Commission is currently studying the Supreme Court ruling and conferring with the state legislature on its impact on South Carolina. As changes occur, the Tax Commission will thoroughly advise taxpayers on their rights and obligations towards federal retirement benefits.

Current state law exempts $3,000 of federal retirement benefits for civil service retirees and for military retirees with 20 years of active duty service. Based on statistics from the federal government, there are approximately 65,000 federal retirees living in South Carolina. It is estimated that fully exempting all federal pensions would cost the state approximately $25-$30 million in revenue each year.

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No. 91-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANCIS EDWIN BASS, JR., *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the holding of the Honorable South Carolina Supreme Court that denied the refunds premised upon adequate and independent state grounds?

2. Was the decision of the Honorable South Carolina Supreme Court "essentially arbitrary or a mere device to prevent the review of the decision upon the federal question?"

3. Is the decision of this Honorable Court in *Davis v. Michigan Department of Revenue*, 489 U.S. 80, 109 S.Ct. 1500, 103 L.Ed. 2d 891 (1989) to be applied prospectively or retrospectively?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Arguments

I. The Petition Should Be Denied Because The Decision Of The South Carolina Supreme Court Is Founded Upon Adequate And Independent State Grounds. 1

II. The Decision Of The South Carolina Supreme Court Is Not Arbitrary As Contended By The Petitioners. Instead, It Is Founded On Established Precedent. 3

III. The *Davis* Decision Is To Be Prospectively Applied. 5

Conclusion 11

TABLE OF AUTHORITIES

Page

American Trucking Association, Inc. v. Smith,
110 S.Ct. 2323 (1990) 6, 7, 8

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263,
104 S.Ct. 3049, 82 L.Ed 2d 200 (1984) 6

Bass v. State (Bass I), _____ S.C. _____,
395 S.E. 2d 171 (1990) 1

Bass v. State (Bass II), _____ S.C. _____,
414 S.E. 2d 110 (1992) 1

James B. Beam Distilling Co. v. Georgia,
501 U.S. _____, 111 S.Ct. 2439 (1991) 6, 11

City of Columbia v. S.C. Public Service Commission,
242 S.C. 528, 131 S.E. 2d 705 (1963) 5

Davis v. Michigan Department of Revenue, 489 U.S. 80,
109 S.Ct. 1500, 103 L.Ed. 2d 891 (1989) ..... passim

Elmwood Cemetery Association v. Wasson, 253 S.C. 76,
169 S.E. 2d 148 (1969) 2

Federal Crop Insurance Corporation v. Merrill,
332 U.S. 380, 68 S.Ct. 1 (1947) 4

Heyward v. South Carolina Tax Commission,
240 S.C. 347, 126 S.E. 2d 15 (1968) 4

Lampf, Pleva, Lipkind, Prupis and Petigrow v.
Gilbertson, 111 S.Ct. 2773 (1991) 2

Lee v. Michigan Millers Mutual Insurance Co.,
250 S.C. 462, 158 S.E. 2d 774 (1968) 4

TABLE OF AUTHORITIES — continued

Page

McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 110 S.Ct. 2238 (1990) 2

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) 1

Roswell v. LaSalle National Bank, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed. 2d 464 (1981) 2

Sandstrom v. Chemlawn Corp., 904 F.2d 83 (1st Cir. 1990) 10

Scott v. South Carolina Tax Commission, 262 S.C. 144, 202 S.E. 2d 854 (1974) 10

Stone v. White, 301 U.S. 532, 57 S.Ct. 851, 81 L.Ed. 1265 (1937) 8, 9

United States, et al. v. Carrick, et al., 298 U.S. 435, 56 S.Ct. 829 (1936) 5

United States v. Jefferson Electric Mfg. Co., 291 U.S. 386, 54 S.Ct. 443, 78 L.Ed. 859 (1934) 8

United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 67 S.Ct. 601 (1947) 4

United States v. Stewart, 311 U.S. 60, 61 S.Ct. 102 (1940) 4

Constitution and Statues:

S.C. Code Ann. Section 12-47-210 (1976) 1, 2, 5

S.C. Code Ann. Section 12-47-220 (1976) 1, 2, 5

S.C. Code Ann. Section 12-47-440 (1976) 4

TABLE OF AUTHORITIES - Continued

Other Authorities:

Black's Law Dictionary 9

8A S.C. Digest, *Equity*, Key 64 10

West's Federal Digest, *United States*, Key 40 4

STATEMENT OF THE CASE

In *Bass v. State* (Bass I), _____ S.C. _____, 395 S.E. 2d 171 (1990), the South Carolina Supreme Court's principal ground for denying the refunds was that *Davis v. Michigan Department of Revenue*, 489 U.S. 80, 109 S.Ct. 1500, 103 L.Ed. 2d 891 (1989) was to be prospectively applied. The court did provide that should it consider state law, the refunds would be denied because the petitioners did not proceed under the proper remedy by paying the tax under protest. S.C. Code Ann. § § 12-47-210 and 12-47-220 (1976).

On remand by this Honorable Court, the South Carolina Supreme Court founded its Order upon adequate and independent state grounds. *Bass v. State* (Bass II), _____ S.C. _____, 414 S.E. 2d 110 (1992). It further concluded that *Davis* was to be prospectively applied. It is from this Order that the petitioners now seek review.

ARGUMENT I

THE PETITION SHOULD BE DENIED BECAUSE THE DECISION OF THE SOUTH CAROLINA SUPREME COURT IS FOUNDED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Under *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed. 2d 1201 (1983), the requirement is for a plain statement that the State Court's decision rests upon adequate and independent state grounds.

The South Carolina Supreme Court clearly complied with this requirement. It held:

> Initially we note that our decision to affirm *Bass I* is based primarily on the adequate and independent

> state ground that the federal retirees are procedurally barred from recovery because they failed to proceed under applicable state statute.

The court later in its conclusion restates the above. The pay under protest with the right of action to recover is an adequate remedy that satisfies constitutional requirements. *Roswell v. LaSalle National Bank*, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed. 2d 464 (1981); *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 110 S.Ct. 2238 (1990). This remedy has also been held by the South Carolina Supreme Court to be adequate. *Elmwood Cemetery Association v. Wasson*, 253 S.C. 76, 169 S.E. 2d 148 (1969).

Before concluding this argument, the court's attention is called to the case of *Lampf, Pleva, Lipkind, Prupis and Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991). There the court adopted a new limitation period and applied it to the parties. The result was that the action was untimely instituted. The petitioners submit this decision in support of their contention that *Davis* is to be retrospectively applied. The respondents, however, submit that this decision convincingly supports the decision of the South Carolina Supreme Court that resolved the issue on adequate and independent state grounds.

This Honorable Court there reviewed the applicable procedure under which those parties could have proceeded in Federal Court. The Court adopted a procedure that overruled long-standing judicial interpretation. The South Carolina Supreme Court, on an issue of first impression, looked to the substantive law of the state to determine the appropriate procedure the petitioners were required to follow. It held that §§ 12-47-210 and 12-47-220 were the petitioners' adequate and exclusive remedies. *Lampf* therefore supports the decision of the South Carolina Supreme Court.

By reason of the above, the petition should be dismissed and this action ended.

ARGUMENT II

THE DECISION OF THE SOUTH CAROLINA SUPREME COURT IS NOT ARBITRARY AS CONTENDED BY THE PETITIONERS. INSTEAD, IT IS FOUNDED ON ESTABLISHED PRECEDENT.

It is difficult to understand the petitioners' contention that the South Carolina Supreme Court acted in an arbitrary manner or device so as to preclude the review by this court. One would have to be totally removed from reality not to know that the petitioners would seek review by this court. The South Carolina Supreme Court was undoubtedly aware of this reality.

The South Carolina Supreme Court upon remand directed the parties to rebrief the issues. The parties were afforded the opportunity to file Appellant, Respondent and Reply Briefs. The petitioners' present contention was fully briefed by the petitioners. The court further directed oral argument wherein the petitioners again presented their position on this contention.

It is further apparent that the South Carolina Supreme Court gave serious consideration to this issue because a substantial part of its Order is devoted to the treatment of the petitioners' contention. The South Carolina Supreme Court traced the history of its decisions and interpretations and found that the pay under protest statute was the petitioners' appropriate remedy.

The petitioners would have this court believe that all of their problems were created by the respondents. Such,

however, is not the case. The petitioners are retired federal employees. As such, they have or should have a greater knowledge of federal law that relates to them. Equally significant, they must have known that the federal government was not bound by their acts if the same were beyond their authority. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 68 S.Ct. 1 (1947); *United States v. Stewart*, 311 U.S. 60, 61 S.Ct. 102 (1940). For other federal cases see West's Federal Digest, *United States*, Key 40. This is the same rule in this state. An administrative body cannot materially alter or add to the law. *Lee v. Michigan Millers Mutual Ins. Co.*, 250 S.C. 462, 158 S.E. 2d 774 (1968). This rule was applied to an administrative interpretation of the respondent, South Carolina Tax Commission, that was made without statutory authority. *Heyward v. South Carolina Tax Commission*, 240 S.C. 347, 126 S.E. 2d 15 (1968).

Surely the petitioners cannot be serious in their contention that the Tax Commission or other state employees could waive the state's immunity to suit. It is settled that no federal employee or officer can waive the immunity of the federal government from suit nor can they confer jurisdiction to a court. *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 67 S.Ct. 601 (1947). The same rule applies in this State. *Lee v. Michigan Millers Mutual Ins. Co.*, supra, *Heyward v. South Carolina Tax Commission*, supra.

Exception is taken to the petitioners' allegations that the respondent, South Carolina Tax Commission, "Advised petitioners to pursue refund claims under S. C. Code Ann. § 12-47-440." The basis for this allegation presumably is the press releases of the South Carolina Tax Commission. Nowhere will one find mention of § 12-47-440 in these releases. Nowhere will one find a statement by the Tax Commission that the refunds would be issued. Instead, the

releases clearly state that the Tax Commission could not issue refunds without legislative or judicial direction.

From 1945 to 1989, the tax was voluntarily paid under a statute that all presumed to be lawful. At no time did any federal retiree raise any question concerning the federal statute. Can they now be held blameless to the detriment of the vast majority of the state's citizens? We think not.

It is further respectfully submitted that the petitioners incorrectly state that whether § § 12-47-210 and 12-47-220 constituted the petitioners' only remedy was not alleged. Such, however, was alleged in the respondents' Answer. Notwithstanding, whether or not raised, it is an inherent power of a court to determine the parameter of its jurisdiction and that of the lower court.

> And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. *United States, et al. v. Carrick*, et al., 298 U.S. 435, 56 S.Ct. 829 (1936). For similar state holding see *City of Columbia v. S.C. Public Service Commission*, 242 S.C. 528, 131 S.E. 2d 705 (1963).

The court of its own motion can resolve jurisdictional questions whether or not presented by the parties.

The decision of the South Carolina Supreme Court is the correct interpretation of state law. It is neither arbitrary nor adverse. The petition should be dismissed.

ARGUMENT III

THE *DAVIS* DECISION IS TO BE PROSPECTIVELY APPLIED.

It is respectfully submitted that this Honorable Court did not rule in *Davis* that the decision was to be retrospectively applied. Additionally, the decisions in *Davis* and in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed. 2d 200 (1984) are distinguishable. Prospectivity was an issue in *Bacchus*; it was not in *Davis*. Hawaii denied that the refunds were to issue; Michigan conceded the same. This Honorable Court remanded *Bacchus* for the Hawaii Court to consider the refund issue. The remand to the Michigan Supreme Court was for the purpose of formulating a procedure to correct the unlawful taxation for future years. As the South Carolina Supreme Court held, Michigan did not interpret *Davis* to be retrospective. Other retirees were not refunded the tax because of *Davis*.

Much argument has been made concerning the retrospective or prospective application of *Davis* and of the decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. _____, 111 S.Ct. 2439 (1991). The South Carolina Supreme Court and other courts have held that *Beam* did not mandate retrospective treatment of *Davis*. Their treatment of this issue is exhaustive and will not be restated in this brief. Instead, the respondents submit what they perceive to be an argument not previously made and that in the respondents' view requires consideration. It is that the action herein is governed by equitable principles.

On this issue, we find the language in *American Trucking Association, Inc. v. Smith*, 110 S.Ct. 2323 (1990), to be refreshing. The minority in *American Trucking*, supra, is now the majority of the plurality in *James B. Beam Distilling Co. v. Georgia*, supra. The minority there accepted the premise that where the Court has equity discretion, it may apply its decision prospectively. Because of such, we quote at length from the language of the dissent in *American Trucking* as follows:

> . . . Close examination of Chevron Oil and its progeny reveals that those cases establish a remedial principle for the exercise of equitable discretion by federal courts and not, as the plurality states, a choice of law principle applicable to all cases on direct review.

110 S.Ct. p. 2353.

> . . . We stressed that a court considering the retroactive effect of a decision establishing a new principle of law should consider remedial issues such as the purpose and effect of the rule in question and the inequity imposed by retroactive application. . .

110 S.Ct. p. 2353.

> More fundamentally, however, Chevron Oil involved the application of a statute of limitations, an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver. . .

110 S.Ct. p. 2354.

> . . . When the federal courts have no equitable discretion, we have held a federal court has no authority to refuse to apply a law retroactively. . .

110 S.Ct. p. 2354.

> . . . "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." . . .

110 S.Ct. p. 2355.

From such, it is apparent that the minority in *American Trucking* concedes that prospective application of the Court's decision may be appropriate when the Court has equitable discretion. The holdings of this Honorable Court are that actions to recover taxes are governed by equitable principles.

In *Stone v. White*, 301 U.S. 532, 57 S.Ct. 851, 81 L.Ed. 1265 (1937), this Honorable Court held that although an action to recover a tax was one at law, it was governed by equitable principles. The court held:

> ... The statutes authorizing tax refunds and suits for their recovery are predicated upon the same equitable principles that underlie an action in assumpsit for money had and received. United States v. Jefferson Electric Mfg. Co., 291 U.S. 386, 402, 54 S.Ct. 443, 449, 78 L.Ed. 859...

It is significant to note the language of *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 402, 54 S.Ct. 443, 449, 78 L.Ed. 859 (1934), concerning this principle:

> "This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action. *It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which ex aequo et bono belongs to the plaintiff.* It was encouraged and, to a great extent, brought into use by that great and just judge, Lord Mansfield, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action." (Emphasis added)

Black's Law Dictionary defines the term "ex aequo et bono" to mean:

> A phrase derived from the civil law, meaning, in justice and fairness; according to what is just and good; according to equity and conscience.

In *Stone v. White*, supra, at p. 853, the Court further held that:

> . . . Since, in this type of action, the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right . . .

It is thus respectfully submitted that the *Davis* decision has not foreclosed its prospective application to this case. No consideration has been given to the equities of this case.

Equity is an integral part of law and justice. To conclude that *Davis* applies throughout the nation without any consideration of equity to the retirees and states other than Michigan should not be accepted. It cannot be the law because of the injustice that results from the federal retirees' voluntary payment of the tax.

If South Carolina is bound by *Davis* because of Michigan's concession that it would refund the tax, then no consideration is given to the circumstances and facts that warrant a different result in South Carolina. If the Court, to establish equality, is to look no further than the fact that both South Carolina and Michigan collected the tax, then it is respectfully submitted that it will stop short of its duty to render equity and justice. A consideration of facts favorable only to the refund claimants fails to establish equality. Equal treatment requires a consideration of the facts applicable to both parties. Equity and

justice in this case must be based upon the fact that the tax when collected was presumed to have been properly collected, that the retirees had voluntarily paid the tax for almost forty-five years,[1] that the State took immediate action to correct the wrong, that the funds had been expended for the public good, that the retirees enjoyed the benefits of such expenditures, that more than ninety-eight percent (98%) of the State's population would primarily suffer the burden of funding the refund of Two Hundred Million ($200,000,000) Dollars, that the State has no funds from which the refunds can be made and that because of such, added taxes or curtailed services would be necessary for the refunds to issue. A refund of these payments cannot be equity and justice under the facts and circumstances here involved.[2]

Additionally as "choice of law", there can be but one just conclusion, *Davis* must be prospectively applied because equity and the ends of justice demand such. To follow stare decisis and apply a rule of law to other cases without a consideration of all pertinent and controlling facts cannot be a "choice of law". The State and the South Carolina Tax Commission respectfully submit that no one rule can dispense justice upon different factual considerations. The issue is not whether the collection was improper. The issue instead is

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[1]Additional evidence that the retirees never raised the issue involved in *Davis*, is found in *Scott v. South Carolina Tax Commission*, 262 S.C. 144, 202 S.E. 2d 854 (1974). In that case, a retired naval commander questioned the taxation of certain of his income, however, failed to raise the *Davis* issue.

[2]"Equity, after all, ministers to the vigilant, not to those who slumber upon their rights." *Sandstrom v. Chemlawn Corp.*, 904 F. 2d 83 (1st Cir. 1990). For other cases see 8A S.C. Digest, *Equity*, Key 64. The retirees had a remedy to contest the tax for each of the almost forty-five years the same was paid.

whether the refunds must issue without regard to the facts and circumstances that would otherwise preclude the same.

The issue whether a new rule of law established by a judicial ruling is to be applied prospectively or retrospectively has its foundation in equity.

It is thus respectfully submitted that the prospective application of the *Davis* decision to this case is not foreclosed by *Beam*. The choice of law is a federal question and because of such, this Court, in considering this issue, must exercise its equitable discretion. Having failed to consider such discretion, the Court accordingly reserved the issue of whether *Davis* was retrospective or prospective. *Davis* should, therefore, be prospectively applied.

CONCLUSION

The respondents respectfully submit that the petition herein should be denied and this action ended.

Respectfully submitted,

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May 11, 1992.

(3)

No. 91-1697

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF THE TAX SECTION, SOUTH CAROLINA BAR IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2 of the Rules of this Court, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petitioners. Petitioners have consented to the filing of the brief. The consent of the Respondents was requested but refused.

INTEREST OF *AMICUS*

Amicus is the Tax Section, South Carolina Bar. The South Carolina Bar is an association established under Rule 410 of the South Carolina Appellate Court Rules. Every person admitted to the practice of law in South Carolina is required to be a member of the South Carolina Bar. There are currently 7483 members of the South Carolina Bar. The Tax Section of the South Carolina Bar was established by the House of Delegates of the South

Carolina Bar on January 7, 1982. It currently has 241 members.

One of the issues presented in this case—whether Petitioners utilization of S.C. Stat. Ann. § 12-47-440 precluded the refund of South Carolina income taxes erroneously, improperly or illegally paid to the South Carolina Tax Commission is of vital importance to all South Carolina taxpayers. For over thirty (30) years South Carolina taxpayers have relied on the provisions of § 12-47-440 as the procedural remedy available to bring an action in state court for the refund of taxes, including income taxes erroneously, improperly or illegally assessed, collected or otherwise paid over to the South Carolina Tax Commission. The holding by the Supreme Court of South Carolina that the provisions of § 12-47-440 are not available to South Carolina income taxpayers leave South Carolina income taxpayers without an adequate remedy in which to claim erroneously, improperly or illegally collected income taxes. *Amicus* which has a duty to insure that the tax laws of the State of South Carolina are correctly interpreted, has a compelling and vital interest in the proper resolution of the question presented. Accordingly, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petitioners.

Respectfully submitted,

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QUESTION PRESENTED

1. Did the Supreme Court of South Carolina err in holding that S.C. Stat. Ann. § 12-47-440 is not a general refund statute, but instead applies only to license type fees and taxes?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE TAX SECTION, SOUTH CAROLINA BAR IN SUPPORT OF PETITIONERS

ARGUMENT

S.C. CODE ANN. § 12-47-440 WAS ENACTED TO PROVIDE SOUTH CAROLINA INCOME TAXPAYERS WITH A SIMPLE METHOD OF RECOVERING TAXES WRONGFULLY COLLECTED

In 1960, upon the recommendation of the South Carolina Tax Study Commission, the South Carolina legislature enacted § 12-47-440. At that time, the Tax Study Commission reported to the legislature that it recommended an "equitable system for submitting claims for refunds for taxes and license fees" illegally collected. (The 1960 Report of the Tax Study Commission is attached as Appendix A.) The new system would allow taxpayers judicial review "without vast technicality." The existing refund procedure, the Tax Study Commission found, resulted in the "[d]eprivation of the rights of individuals."

The new remedy, which the Tax Study Commission hoped would cure existing abuses was, "a claim for refund, required to be filed within three years of the date the tax was originally due, with an appeal to the Court of Common Pleas within thirty days of notice of denial by the Tax Commission." It is clear from the explanation contained in the Tax Study Commission's report that § 12-47-440 applies to all taxes including income taxes.

Since 1960 South Carolina income taxpayers have routinely filed with the South Carolina Tax Commission claims for refunds under § 12-47-440. See, Boyle and Von Lehe, South Carolina Income Taxation, Third Edition (1987), I-2. Since 1960, the South Carolina Tax Commission itself has accepted and even advised South Carolina income taxpayers to file claims for refund under § 12-47-440 (see Appendix B attached hereto).

The Supreme Court of South Carolina holding that § 12-47-440 is not a general refund statute, but instead applies only to license type fees and taxes leaves South Carolina income taxpayers who have erroneously paid income taxes to the State of South Carolina without a remedy at law. This result is contrary to the plain language of the statute and is not what the Tax Study Commission or the South Carolina Legislature intended in 1960 when the predecessor to § 12-47-440 was enacted.

Respectfully submitted,

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APPENDICES

APPENDIX A

FIRST ANNUAL REPORT

of the

SOUTH CAROLINA TAX STUDY COMMISSION

to the

1960 GENERAL ASSEMBLY

COLUMBIA, SOUTH CAROLINA

January, 1960

VI. IT IS RECOMMENDED that an equitable system for submitting claims for refund for taxes and license fees improperly, illegally or erroneously assessed or collected be instituted, and that the claimant be granted, without vast technicality, judicial review of adverse holdings by the Tax Commission. A three year statute of limitations is recommended. See Exhibit M for recommended legislation.

Present Provisions: There are presently three routes which a taxpayer may take in order to seek recovery of taxes or license fees he deems improperly paid over to the State. Two of these dead-end with the Tax Commission. The third is so fraught with technicality and expense as to be practically unavailable for the vast majority of taxpayers. First, the Tax Commission may on its own motion any time within five years revise downward an assessment. (See Section 65-322.) No appeal is available from a denial by the Commission, and, since there is no way to receive a partial refund "under protest", a taxpayer's remedy ends at the Tax Commission. (But see Sections 65-2681, 65-2682 and 65-2683 which prescribe no time limit for relief.) Second, where income taxes are involved a taxpayer may apply to the Tax Commission within one year of payment for a revision of an assessment. (See Section 65-327.) The Tax Commission, within its discretion, may or may not grant the request. Here again there is no judicial review. The last method provided is available only to a taxpayer who realizes in advance of payment that he will claim a refund. In this circumstance an appeal is available only where: (1) the tax is paid under protest and (2) within thirty days a formal summons and complaint against the Commission is served in the Court of Common Pleas. (See Sections 65-2661 and 65-2662.)

Explanation: Deprivation of the rights of individuals is not new in administrative proceedings but, rather, is widespread. This is usually explained away as mandatory

for the proper functioning of the machinery. The Commission was unimpressed by this argument and inclined toward the conclusion that restrictive appeal procedure with respect to administrative bodies likely has its roots in "convenience of the members of the administrative body". While neither abuse of authority nor autocratic method and manner is laid at the doorstep of the Tax Commission, nonetheless, no one can deny that, w .hout the two basic and essential safeguards set out here, abuse can occur, and must almost necessarily occur somewhere off in the future. And, be aware of this, the man who is most vulnerable is not the more susbtantial taxpayer necessarily but, in the opinion of the Commission, is the one who cannot afford the expense of litigation, and who alone cannot walk gingerly down the tight-rope of technicality.

Any administrative agency existent, when its prerogatives are attacked, if it is worth its salt, will offer endless reasons and objections to any proposed reform measure; point out the dire consequences that will result, and show by charts, graphs and other statistics how wonderfully the system in effect has operated through the years. The fact of the matter is, the loudest objector to procedural reform will always be that administrative agency least able to stand the spot light of publication and judicial review.

The system recommended here is simply a claim for refund, required to be filed within three years of the date the tax was originally due, with an appeal to the Court of Common Pleas within thirty days of notice of denial by the Tax Commission. The appeal it is suggested may be taken in the county of residence of the claimant or in Richland County at the election of the claimant. The restriction to three years here would not affect in any way the Tax Commission's authority to assess deficiencies within a five year period. Nor, would uncertainty of revenue result, for, we are informed, under provisions

permitting adjustments in assessments within five years, the Tax Commission has made refunds in all worthy cases. If this be true, then to provide the safeguard recommended, no substantial effect on the revenue could result; if this not be true, then the case for judicial review is proved.

VII. IT IS RECOMMENDED that statutory provision be made for extension of time for filing income tax returns and franchise tax returns; that refunds of taxes be limited to those of one dollar or more in amount; that the requirement that the Tax Commission publish all refunds made be eliminated; and that double withholding be avoided. See Exhibit N for recommended legislation.

Present Provision: There is no statutory authority available to authorize the granting of extensions of time for filing income tax returns and franchise tax returns. Refunds are required to be published annually in the Tax Commission's report. Withholding can presently be instituted by two states on the same earnings with respect to a legal resident of South Carolina who works in a second state.

Explanation: Statutory provisions for the granting of extensions for the filing of income tax and franchise tax returns do not exist. These would now be instituted. There is no logical reason to continue to publish all refunds made by the Tax Commission, particularly now with the withholding of income taxes in effect and the prospect of refunds numbering several hundred thousand. To limit refunds to one dollar or more is an administrative aid designated to simplify one of the problems which will arise under withholding. Withholding also brings in the possibility of double withholding where a South Carolina resident works in another state and where this second state has withholding. The recommended provision would permit the Tax Commission to exempt an employer from withholding where double withholding would result.

EXHIBIT M

A BILL

To Amend the Code of Laws of South Carolina, 1952, so as to Provide a Three Year Statute of Limitations for Filing Claims for Refund of License Fees and Taxes, and to Provide for Appeals to the Circuit Courts.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. The Code of Laws of South Carolina, 1952, as amended, is further amended by adding a new section to be known as Section 65-2686, to read as follows:

"Section 65-2686. Notwithstanding any other provisions of this title, whenever it shall appear to any taxpayer that any license fee or tax imposed under this title has been erroneously, improperly, or illegally assessed, collected or otherwise paid over to the Commission, the taxpayer, by whom or on whose behalf said license fee or tax was paid. may make application to the Commission to abate or refund in whole or in part such license fee or tax. Should the Commission. after having given such taxpayer a reasonable opportunity to be heard, decline to make such abatement or refund, said taxpayer may, within thirty days of the date of receipt of notice of the Commission's action declining said abatement or refund, bring an action against the Commission for recovery of said license fee or tax. The provisions of this section shall apply whether or not the license fee or tax in question was paid under protest, but shall only be available where the application provided for herein is made in writing to the Commission within a period of three years from the date the license fee or tax was due to have been paid, without regard to extensions of time for payment, or if a later date would result, within one year of payment where an

additional license fee or tax is assessed and paid. Such action shall be brought in the Court of Common Pleas for Richland County except that a resident of this State may elect to bring said action in the Court of Common Pleas for the county of his residence.

A taxpayer or licensee who brings an action provided for in Sections 65-2661 and 65-2662 shall be considered as having elected his remedy and is denied the benefits of this Section."

SECTION 2. All acts or parts of acts inconsistent herewith are repealed.

SECTION 3. This act shall take effect upon approval by the Governor, and apply to taxes or license fees paid or assessed after December 31, 1959.

APPENDIX B

SECTION IV
INDIVIDUAL INCOME TAX RETURNS

GENERAL INSTRUCTIONS
RESIDENT, NONRESIDENT, PART-YEAR RESIDENT

SHOULD I FILE A SOUTH CAROLINA INCOME TAX RETURN?

Were you required to file a federal income tax return which included income taxable by South Carolina?

Did you have South Carolina income tax withheld from your wages?

Are you a nonresident or part-year resident with income taxed by South Carolina?

If you answered YES to any one of the questions above, file a South Carolina income tax return.

AM I A RESIDENT OR A NONRESIDENT?

The following definitions will help you decide:

You are a South Carolina resident, even if you live outside South Carolina, when:

1. You think of South Carolina as your permanent home; AND
2. South Carolina is the center of your financial, social and family life; AND
3. When you are away, South Carolina is the place to which you intend to return.

You are a nonresident if your permanent home is outside South Carolina all year and none of the above applies to you.

WHAT IS MY STATUS IF I MOVED INTO OR OUT OF SOUTH CAROLINA IN 1989?

You are a part-year resident.

As a part-year resident, you may consider yourself a full-year resident or a nonresident.

If you elect to be a full-year resident, file the resident Form SC1040 (Long Form). Report all your income as though you were a resident for the entire year. You will be allowed a credit for taxes paid to another state.

If you elect to be a nonresident, file the nonresident form, SC1040NR. You will be taxed only on income earned as a resident in South Carolina and will prorate your deductions and exemptions.

You may choose the way that is most advantageous to you.

I AM A FULL-YEAR SOUTH CAROLINA RESIDENT BUT MY SPOUSE IS NOT. HOW SHOULD WE FILE?

If you both file a joint federal return, you must file a joint South Carolina Return SC1040NR (Nonresident Form). The resident spouse will report to South Carolina all income for the entire year. The spouse that is not a resident on the joint return will only report income earned in this state, if any.

If you both file separate federal returns, you must file a separate South Carolina return. Your spouse must also file a separate South Carolina return if he/she has income taxable by South Carolina. See "What Form Do I Use?"

I AM IN THE ARMED FORCES. WHAT IS MY RESIDENCY STATUS?

South Carolina Resident

If you enter the armed forces when you are a South Carolina resident, you do not lose your South Carolina residency status, even if you are absent from this state on military orders. You are subject to the same residency requirements as any other South Carolina resident and are required to file a South Carolina income tax return (SC1040 or SC1040A).

Nonresident

If you are not a South Carolina resident but are stationed in this state by military orders, your military income is not subject to South Carolina tax. However, if you have income subject to South Carolina tax, file Form SC1040NR. South Carolina DOES tax other income earned in this state by you or your spouse.

WHAT FORM DO I USE?

Use FORM SC1040A (Short Form) if all of the following apply to you:

- You are a full-year South Carolina resident.
- Your income is only from wages, interest, ordinary dividends or unemployment.
- You have no adjustments to your federal taxable income for South Carolina purposes.
- Your federal taxable income is less than $50,000.

Use FORM SC1040 (Long Form) if any one of the following applies to you:

- You itemized your deductions on your federal return.
- You paid estimated tax to South Carolina in 1989.

- You claimed tax credits on Schedule TC.
- You have any adjustments to your federal taxable income as discussed in the instructions.
- You are a part-year resident who elects to file as a resident.

Use FORM SC1040NR if any one of the following applies to you:

- You are a part-year resident electing to file as a nonresident.
- You are a nonresident.
- One spouse is a full-year resident and the other spouse is a nonresident.

WHEN SHOULD I FILE MY RETURN?

RETURNS FOR CALENDAR YEAR 1989: file on or before April 16, 1990.

RETURNS FOR FISCAL YEAR TAX PERIODS: due on or before the fifteenth (15th) day of the fourth month following the close of your tax year. Identify the fiscal year period at the top of the return in the space provided and write "FISCAL" in large letters across the face of the return.

NEED MORE TIME TO FILE?

If you need more time to file your South Carolina return, note the following:

- If you will receive a refund of state taxes, South Carolina will allow you the same length of time that is allowed by your federal extension.
- When you file, simply attach a copy of your federal extension form to your South Carolina return.

If you need more time to file your South Carolina return and you owe additional tax:

- Attach payment of taxes due to South Carolina to a separate copy of your federal extension or to South Carolina extension Form SC4868.
- To avoid penalty and interest, mail any tax due by April 16, 1990.
- Enter the amount you paid with your extension on Form SC1040 (Long Form), line 17, or SC1040 NR, line 12.

BE SURE TO ATTACH A COPY OF EITHER YOUR FEDERAL EXTENSION OR SOUTH CAROLINA EXTENSION TO YOUR SOUTH CAROLINA RETURN WHEN YOU FILE.

MORE TIME TO FILE DOES NOT MEAN MORE TIME TO PAY YOUR TAXES!

You will owe interest from April 16, 1990, to date of payment. A penalty may also be charged after April 16th if an additional amount is required. To avoid the penalty, you must: 1) pay at least ?0% of the tax by April 16, 1990, and 2) Pay the additional balance due if, any, within the extended time period. In the case of a failure to file within sixty days of the due date the penalty will not be less than the lesser of one hundred dollars or the amount of the tax due.

I AM GETTING AN INCOME TAX REFUND THIS YEAR. WHEN WILL I GET MY CHECK?

Returns which are filed early are processed before and usually more quickly than returns filed closer to April 16. Ordinarily, within ten weeks after we receive your complete return we will mail your refund check. Therefore, allow at least ten weeks for your refund to arrive before you contact us.

IS THERE ANYTHING I CAN DO TO HELP YOU PROCESS MY RETURN CORRECTLY AND SEND MY REFUND FASTER?

Yes, there are several things you can do:

- File as early as possible.
- Affix the address label (corrected, if necessary) to the name and address area of your return.
- Check your return to be sure that you have filled in all necessary information, that your calculations are accurate, and that it is legible.
- Comply with the check list on the envelope.
- Check the appropriate block (Refund; Tax Due; or No Refund, No Tax Due) on the envelope. Checking the wrong block or no block may slow processing.

ROUND OFF CENTS TO THE NEAREST WHOLE DOLLAR.

You must round off cents to the nearest whole dollar on your return and schedules. You must drop amounts less than 50 cents. Increase amounts of 50 to 99 cents to the next dollar. For example: $2.15 becomes $2.00; $4.75 becomes $5.00; and $3.50 becomes $4.00.

WHAT TAX RECORDS DO I NEED TO KEEP?

Keep a copy of your return. Also, keep the original or a copy of any papers or statements you used to prepare your return. Keep your records that support an item of income or a deduction appearing on a tax return until the statute of limitations for the return runs out. The statute of limitations is generally THREE YEARS from the date the return was due or filed, whichever is later.

Save any records concerning property, home, stocks, and business property you bought and may sell later. The

records kept should show the purchase price, date, and related cost; and for real property: cost and date of improvements. Your return may be audited by the IRS or the South Carolina Tax Commission. If audited, the law requires you to show proof of your income, expenses, and cost of assets.

WHEN SHOULD I FILE AN AMENDED SOUTH CAROLINA RETURN?

File Form SC1040X (Amended Return) any time you need to correct your South Carolina return. If you amend your federal return, usually you will need to amend your state return.

PRIOR YEAR REFUNDS

You may apply for a refund on either an amended or delinquent return within three (3) years of the original due date of the return. Refunds will not be issued for requests received more than three (3) years after the original return's due date.

REFUNDS OFFSETS

The Tax Comission assists in the collection of debts owing to South Carolina colleges for the repayment of student loans, debts owing to entities of the State of South Carolina and debts owing to the Internal Revenue Service. The Tax Commission may set off any refunds due the debtor by the amount certified by the claimant agency as delinquent debt. Reviews of refund setoffs are with the claimant agency.

WHAT IF I AM AUDITED BY THE IRS?

If you receive a refund or owe additional federal tax, file an amended South Carolina return after the federal audit report becomes final.

ESTIMATED TAX YOU PAID FOR THE 1989 TAX YEAR

Estimated tax is the amount of tax you prepaid on your 1989 income tax. Include any amount you credited from your refund on the 1988 South Carolina individual income tax return.

WHO MUST FILE A DECLARATION OF ESTIMATED TAX?

Generally, you must file a Declaration of Estimated Tax, Form SC1040ES, for 1990 if you estimate that your tax will be $100 or more and that the total amount of income tax that will be withheld will be less than the lesser of:

1. 90% of the tax to be shown on your 1990 income tax return, or
2. 100% of the tax shown on your 1989 income tax return (if your 1989 return covered all 12 months of the year).

Wage earners who do not have enough tax withheld from their wages must file a Declaration of Estimated Tax for the year. You have two methods for paying:

1. increase the amount your employer withholds from your wages, or
2. pay estimated tax in addition to the usual amount withheld from your wages.

Self-employed people who do not have South Carolina tax withheld from their income must file a Declaration of Estimated Tax for the year.

Recipients of taxable pensions and annuities who do not have at least 90% of their South Carolina income tax liability withheld must file a Declaration of Estimated Tax for the year.

WHO DOES NOT HAVE TO FILE A DECLARATION OF ESTIMATED TAX?

Farmers and commercial fishermen do not have to file a declaration if at least two-thirds of their gross income is from farming or fishing.

HOW DO I FILE ESTIMATED TAX?

Complete a South Carolina Declaration of Estimated Tax form (Form SC1040ES). The South Carolina Tax Commission mails declaration vouchers to taxpayers who may need to pay estimated tax based on past estimates. If you need to file but did not get your vouchers, contact the South Carolina Tax Commission.

MOVING?

Let us know your new address. Write to: South Carolina Tax Commission, Office Services Division, P.O. Box 125, Columbia, South Carolina 29214.

Supreme Court, U.S.
FILED
MAY 29 1992
OFFICE OF THE CLERK

(4)

No. 91-1697

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FRANCIS EDWIN BASS, *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA, *et al.*

Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

Cases: Page

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 2

Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989) 3

Elmwood Cemetery Assoc. v. Wasson, 169 S.E.2d 148 (S.C. 1969) 4

Harper v. *Virginia Department of Taxation*, No. 91-794 1

Harris v. Reed, 489 U.S. 255 (1989) 1

Howlett v. Rose, 110 S.Ct. 2430 (1990) 3

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S.Ct. 2773 (1991) 2

McKesson Corp. v. Florida Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) 2, 5

Michigan v. Long, 463 U.S. 1032 (1983) 1, 3

Perpetual Building & Trust Assoc. v. South Carolina Tax Comm'n, 180 S.E.2d 195 (S.C. 1971) .. 4

Slater Corp. v. South Carolina Tax Comm'n, 314 S.E.2d 31 (S.C. App. 1984) 3

United States v. Livingston, 179 F. Supp. 9 (E.D. S.C. 1959), *aff'd*, 364 U.S. 281 (1960) 2

Ward v. Love County Board of Commissioners, 253 U.S. 17 (1920) 3, 5

Statutes:

S.C. Stat. Ann. § 12-47-440 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1697

FRANCIS EDWIN BASS, *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA, *et al.*

Petition for a Writ of Certiorari to the Supreme Court of South Carolina

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

On May 18, 1992, this Court granted certiorari in *Harper v. Virginia Department of Taxation*, No. 91-794. This Court's disposition of *Harper* will control the merits of this case. Thus, the only remaining inquiry here is whether the asserted "independent state law ground" advanced by the court below defeats this Court's jurisdiction to review this case. It does not.

1. The court below held that in pursuing refunds under S.C. Stat. Ann. § 12-47-440 petitioners had utilized the incorrect refund statute and thus were procedurally barred from obtaining any relief. Pet. at 10a. It further held that this putative failure is an "adequate and independent state ground," *id.* at 3a, *citing Michigan v. Long*, 463 U.S. 1032 (1983), and *Harris v. Reed*, 489 U.S. 255

(1989), ostensibly precluding further review of the federal questions presented.

The court below is incorrect in its assertion that petitioner's utilization of the putatively incorrect refund statute is an "adequate" ground for denying relief. Even accepting the court's *current* interpretation of § 12-47-440, petitioners have a right to relief directly under the Fourteenth Amendment. By holding that § 12-47-440 is inapplicable, the court below has effectively shortened the statute of limitations in South Carolina for income tax refunds from three years to thirty days. As this Court has previously held, a state may not, either through its legislature or its courts, strip taxpayers of all existing rights for refund of unlawful taxation. *Brinkerhoff-Faris Trust & Saving Co. v. Hill*, 281 U.S. 673, 682 (1930). *See also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2786-87 (1991) (O'Connor, J., dissenting).

Similarly, irrespective of the scope of South Carolina's refund statute, petitioners have a Fourteenth Amendment right to "a clear and certain remedy" for unconstitutional taxation. *McKesson Corp. v. Florida Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 21 (1990). The "pay under protest" statute to which the court below suggests petitioners were relegated has previously been held not to provide a "plain, speedy and efficient remedy," *United States v. Livingston*, 179 F. Supp. 9 (E.D. S.C. 1959) (Haynsworth, J.), *aff'd*, 364 U.S. 281 (1960); indeed, this was in large measure the impetus for the enactment of what is now § 12-47-440. *See* Brief *Amicus Curiae* of the Tax Section of the South Carolina Bar at 2a (legislative history characterizing the pay under protest procedure as "so fraught with technicality and expense as to be practically unavailable for the vast majority of taxpayers.") The inadequacy of this remedy, coupled with the confusion engendered by the plain language of § 12-47-440, its administrative construction by the South Carolina Tax Commission, and its prior inter-

pretations by the courts of South Carolina,[1] render petitioners' remedy here anything but "clear and certain." This is especially so with respect to 1988 taxes, which were paid after *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), was decided and after the Tax Commission repeatedly advised petitioners to pursue refunds under § 12-47-440. *See* Pet. at 6a; 41a-47a.

2. Not only must an asserted state law ground be "adequate" to preclude review by this Court, so too must it be "bona fide." *Michigan v. Long*, 463 U.S. at 1041. *See also Howlett v. Rose*, 110 S. Ct. 2430, 2437 & n.14 (1990) (review not foreclosed upon assertion of "nonfederal grounds of decision that were without any fair or substantial support," *quoting Ward v. Love County Board of Commissioners*, 253 U.S. 17, 22 (1920)). The court below concluded that § 12-47-440 applied only to "license type fees and taxes." Pet. at 5a. It reached this conclusion in the face of statutory language granting a refund right to "any taxpayer," § 12-47-440,[2] and without explaining why it eschewed its ordinary deference to the construction of the South Carolina Tax Commission.

Moreover, while the court suggests that its ruling is firmly anchored in precedent, Pet. at 4a ("This Court has previously stated that 'the exclusive remedy for contest-

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[1] Petitioners mistakenly refer in their petition to the decision of *Slater Corp v. South Carolina Tax Comm'n*, 314 S.E.2d 31 (S.C. App. 1984) as a decision of the Supreme Court of South Carolina. *See* Pet. at 10-11 n.4 and 12. That decision is of the intermediate court of appeals, not the Supreme Court.

[2] Moreover, the enabling clause of the original enactment of § 12-47-440 provided that "[t]his act shall . . . apply to taxes or license fees paid or assessed after December 31, 1959." Brief *Amicus Curiae* of the Tax Section of the South Carolina Bar at 6a. Thus, the statutory language grants a refund right to "any taxpayer" for any illegal "taxes or license fees." This statutory language is utterly irreconcilable with the parsimonious construction of § 12-47-440 adopted by the court below.

ing . . . *income taxes* [is] by payment under protest' ", *citing Perpetual Building & Loan Assoc. v. South Carolina Tax Comm'n*, 180 S.E.2d 195, 197 (S.C. 1971) (emphasis original)), in fact this putative precedent is merely creative parsing of dicta from a case citing the availability of § 12-47-440 in income tax cases. That is, the complete sentence to which the court only partially cites states:

> In *Elmwood Cemetery Assoc. v. Wasson*, 169 S.E.2d 148 (S.C. 1969), *we there denied* the declaratory relief sought, holding that the exclusive remedy for contesting an alleged erroneous assessment of income taxes was by payment under protest of the tax claimed as illegal and a suit at law for recovery of the sum so paid, in accordance with Sections 65-2661 and 65-2662 of the Code.

Perpetual Building & Loan Assoc., 180 S.E.2d at 197 (emphasis added). Discussing the pay under protest provisions in *Elmwood*, the court held:

> This chapter authorizes the payment of taxes claimed to be illegal under protest and suit at law for the recovery of the sum so paid. Sections 65-2661 and 2662, *ibid. With the exception of certain remedies before the Commission, which are in nowise involved*, the Code is explicit that the remedy provided by these sections is exclusive.

169 S.E.2d 148 (emphasis added.) Thus, *Elmwood* holds that refunds are available under the pay under protest provisions *or* under administrative procedures (now § 12-47-440). Because *Perpetual Building & Loan Assoc.* is explicitly predicated on *Elmwood*, its citation to support the exclusivity of the pay under protest provisions is wholly inapt.

For these reasons, the lower court's reliance on *Perpetual Building & Loan Assoc.* is inappropriate and its holding that South Carolina's pay under protest provisions are the exclusive means for seeking refund of income taxes is "without any fair or substantial support." *Ward*

v. Love County, 253 U.S. at 22. The State's wishes to the contrary notwithstanding, its assertion of this putative "state law ground" neither precludes review of the substantial federal questions presented here nor relieves it of its obligations to provide petitioners "meaningful backward-looking relief." *McKesson*, 496 U.S. at 31.

CONCLUSION

For the foregoing reasons, and for those reasons stated in the Petition, the Petition for a Writ of Certiorari to the Supreme Court of South Carolina should be granted.

Respectfully submitted,

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